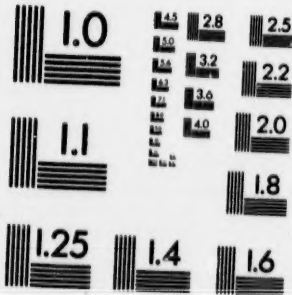


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July

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July 1863

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THE
LOWER CANADA

Jurist.

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7 L. C. Jurist.

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As a foot-note to *Mussen vs. Philbin*, p. 165. "Vide *Leblanc & Pellerin*, p. 113, and authorities given there."

In foot-note to *Ross vs. Burns*, p. 39, for *Omin vs. Atcheson*, read, "*Berry vs. Dixon*, 4 L. C. Repts., 218. *Quinn vs. Atcheson*, 4 L. C. Repts., 378.

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THE
LOWER CANADA JURIST.

SUPERIOR COURT.

MONTREAL, 31ST DECEMBER, 1862.

Coram SMITH, J.

No. 235.

Exparte JOHN MOLEY.

(for a Writ of Certiorari.)

AND

RAPHAEL BELLEMARE,

(Prosecutor in the Court below.)

- Held:—**1. That in a prosecution for selling fermented liquors without a license, it is not necessary to negative the averment that the Defendant is not a distiller within the provisions of the 1st section of chap. 6 of the Consolidated Statutes of Lower Canada.
2. That the allegation that the Defendant sold by retail at one time fermented liquor in a less quantity than three gallons, to wit: three glasses of beer, is sufficient and legal and that such an allegation of an offence committed on a day certain, "and at diverse times before and after," does not include several offences, it being conformable to the form of declaration given in the said chap. 6, C. S. of L. C.
3. That by chap. 6 of the Consolidated Statutes of Lower Canada, the convicting magistrate has a discretionary power of giving any one of the three judgments mentioned in section 32, subsection 2, sections 38 and 39 and section 40.
4. That the convicting magistrate has the right to grant costs either upon conviction or dismissal of the prosecution and even to attorneys.*

In this case the information and conviction were for the offence of retailing fermented liquor without a license.

The information against the Defendant was as follows:—

For that whereas the said John Moley did, at the City of Montreal, aforesaid, in the said Second Division, in the District aforesaid, to wit: in the house and premises there situate and occupied by him, the said John Moley, on the 30th day of October, in the year one thousand eight hundred and sixty-two, and at sundry times before and since, sell by retail in a quantity less than three gallons at one time, certain fermented liquor, to wit: three glasses of beer; without hav-

* Vide Sec. 53 and 54 chap. 103, of the Consolidated Statutes of Canada. Saunders's Practice of Justice's Courts, upon Jervis' acts, pp. 69, 70.

Moley,
and
Bellemare.

ing previously obtained a license required by the provisions of the Statute in such case made and provided, contrary to the Statute in such case made and provided: whereby and by force of the said Statute, the said John Moley hath become liable to pay the sum of fifty dollars. On the day assigned in the summons, the Defendant appeared by his attorney, B. Devlin, Esquire, as he had a right to do, under the Consolidated Statutes of Canada, chap. 103, sec. 30. before the Judge of the Sessions of the Peace for the City of Montreal, and pleaded not guilty. Whereupon, proof being made of the offence, the Defendant was, on the 18th November, 1862, condemned by the Judge of the Sessions of the Peace for the City of Montreal, to pay the penalty of £12 10s., with costs to the prosecutor.

The conviction was as follows:

Be it remembered that on the eighteenth day of November, in the year one thousand eight hundred and sixty two, at the City of Montreal, in the said District of Montreal, John Moley of the City of Montreal, in the District of Montreal, within the first division of the said District of Montreal for revenue purposes, trader, is convicted before the undersigned, Charles Joseph Coursol, Esq., Judge of the Sessions of the Peace in and for the City of Montreal, for that he, the said John Moley did at the City of Montreal aforesaid, in the house and premises there situate and occupied by him, and within the said first division of the said District of Montreal, for revenue purposes, on the thirtieth day of October last past, and at sundry times before and since, sell by retail, in a quantity less than three gallons at one time, certain fermented liquor, to wit: three glasses of beer; without having previously obtained the license required by the provisions of the Statute in such case made and provided, contrary to the statute in such case made and provided whereby he the said John Moley hath forfeited, and I, the said Judge of the Sessions of the Peace in and for the City of Montreal, do adjudge the said John Moley for his said offence to have forfeited and to pay to Raphael Bellemare of the said city of Montreal, Collector of Inland Revenue for the first division of the said District of Montreal, for revenue purposes, the sum of fifty dollars, current money of this Province, and also to pay to the said Raphael Bellemare the sum of six dollars and sixty three cents, amount of costs by me allowed and adjudged to be paid to the said Raphael Bellemare for his costs in this behalf. And, in default of immediate payment of the said several sums, I order that the same be levied by distress and sale of the goods and chattels of the said John Moley: and in default of such goods and chattels, or in case of their being insufficient, I do further order and adjudge, that the said John Moley be committed to the common jail at the City of Montreal for the period of three months, unless the said several sums of money, and the costs and charges of the said distress, commitment, and of the conveying of the said John Moley to the said common jail, shall be sooner paid.

Given under my hand and seal, the day and year first above mentioned, at the City of Montreal, in the district of Montreal aforesaid.

Signed, CHAS. J. COURSOL,
Judge of the Sessions of the Peace.

The Defendant moved the Superior Court in and for the District of Montreal, on the 20th December, 1862, for a Writ of Certiorari to issue upon the following grounds, contained in his affidavit of circumstances, to wit:—

1. Because no legal offence was charged against said Deponent upon which to base the said judgment.
2. Because it does not appear by the said declaration, summons, or prosecution that said Deponent sold by retail at one time in a quantity less than three gallons, certain fermented liquor, as therein pretended.
3. Because, even assuming that it was properly alleged that he sold by retail certain fermented liquor, in a less quantity than three gallons at one time, there is no allegation in the said declaration, summons, or prosecution to indicate that he had not a right so to do, on the contrary it is expressly enacted by the Statute in this behalf, that distillers may sell by retail in a less quantity than three gallons at one time any kind of fermented liquor, and in no part of the said proceedings so had against Deponent, is it alleged that he was not at the time of such pretended sale a distiller.
4. Because no such prosecution as is hereby complained of can be brought or commenced except it is so commenced within six months after the alleged offence, and no such allegation has been made in the prosecution of this complaint, nor does it appear, with legal certainty, when the said pretended offence was committed.
5. Because it does not appear, by the Statute in this case made and provided, in what place the sale of fermented or any other kinds of spirituous liquors is prohibited without a license.
6. Because it does not appear by the said judgment when the said alleged offence was committed, nor at what particular time or place.
7. Because the corporeal punishment substituted for the penalty to which Deponent was condemned as aforesaid, in the event of non-payment, does not extend to the costs, or at any rate to any greater sum than that amount of costs awarded by the said judgment, to wit: the sum of six dollars and sixty three cents mentioned in said judgment.
8. Because it does not appear by the said judgment what amount of costs said Deponent is condemned to pay and also because he is condemned to pay not only the said penalty of fifty dollars and the costs thereon incurred, but also all the costs and charges of distress, commitment, and of conveying said Deponent to jail in the event of his not paying said penalty and said costs, amounting to six dollars and sixty three cents without in any way limiting the additional costs imposed by the said judgment.
9. Because the said judgment orders, in the event of the non-payment of the said penalty and costs thereon incurred, a sale of the goods and chattels of said Deponent, without it appearing in any way that said Deponent was, by the said Charles Joseph Coursol, Esq., called upon to declare whether or not he possessed sufficient goods and chattels to satisfy the said judgment and costs.
10. Because several offences were in and by the said prosecution alleged against Deponent without, however, the time and place of each pretended offence being in any way given or made known to him.

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and
Bellefleur.

11. Because it does not appear in and by the said judgment whether it was rendered on the confession of this Deponent or upon the evidence of one or more witnesses or witnesses as is by law required.

Devlin urged in support of the motion.

1. That the enacting clause creating the offence was the first section of chapter 6 of the Consolidated Statutes of Lower Canada.

2. That the negative averment that the Defendant was not a duly licensed distiller according to the provisions of that clause, ought to have been made in the prosecution.

3. That the prosecution had been brought under that clause and that, in the absence of that negative averment, the Judge of the Sessions of the Peace had no jurisdiction and that the Writ of Certiorari, although taken away by Statute, ought to be granted, when such a want of jurisdiction is apparent. Paley on Convic., p. 104, 192, &c., page 196, "preceding clause" &c.

4. That the allegation that the Defendant sold by retail fermented liquor in a less quantity than three gallons at one time, to wit: *three glasses of beer*, implies that he may have sold more than three gallons,* the dimensions of such glasses being unknown to the law.

5. That the conviction did not state whether the Defendant was so convicted upon his own confession or upon evidence, nor that the offence had been committed within 6 months.

6. That the information alleged several offences and that by the conviction the Defendant was convicted of his said offence, which was a fatal error.†

7. That the Defendant was condemned to pay certain costs which could not be given against him, and that particularly he could not be imprisoned for the payment of the fee of 11s. 8d., granted to the attorney for the prosecutor.

8. That the Judge of the Sessions of the Peace was bound by law before granting a warrant of distress to call upon the Defendant to declare whether or not he possessed sufficient goods and chattels to satisfy the said judgment and costs.

LaFrenaye for Prosecutor, urged against the granting of the motion:

1. That such matter of excuse as contended by the Appellant being found in another distinct clause, need not be specifically set out or negated. Paley p. 205 Paley on Convic., p. 210, "But if the exception come by way of proviso," &c.

2. That it is sufficient to allege the sale "without any license previously obtained." Paley, p. 206, 207, and 5 and 12. 1 Strange, 554, 5d., 1101. 3 Dowl. and R. 461, 1 B. and Ald. 94. Burn's Justice v. Ale-houses, p. 86, Ed. of Chetwynd.

Moreover a distiller duly licensed cannot sell beer. Ch. 19 Cons. S. of C., secs. 2, 3, and 4.

3. It is not necessary to negative a mere *constructive* qualification. Paley, p. 204; besides the Provincial Statute has given a form of Declaration not requiring any further negative averments than what is therein contained, and a negative averment is not necessary in a Declaration for a penalty. 2 Chitty, p. 167. 1 T. R. 144. 1 Lev. 26. 1 East. 639. 2 Comyn's Rep., 524.

* Archbold Crim., p. & p., p. 609.

† Cons. St. of C., ch. 103, sec. 25.

4. By the recent forms of conviction given by the Statutes, it is a settled point that it omits all statement of the evidence, and at once proceeds to the adjudication. Paley 116, 117; 136, 137, vide Paley, ch. 3, sec. 1, general form of conviction, &c.

5. That the form of conviction being given by the Statute, chap. 6 Con. S. of L. C., is sufficient in law, sec. 43 of said chap. 6. Paley, p. 134, 136, 231.

The recital of the offence in the conviction being made in the same terms as those contained in the prosecution establishes that the prosecution was commenced within six months after the alleged offence, although it is only a matter of evidence. Paley, p. 155, note 2, p. 43. Wray vs. Toke, new session cases. Saunder's Practice of Mag's. Courts. p. 13.

6. By the form of the Declaration D. Sec. 43, chap. 6 Cons. S. of L. C., the offence must be stated to have been committed, "and at sundry times before and since," which form being *legalised* by said section 43, must be followed. In *Ex parte Allison*, 24 L. J. p. 217, Baron Parke said, "If the Justices conform with the form given, it shall be sufficient, otherwise the act would be nothing but a trap." Paley, 155.

7. That by the Cons. S. of L. C., ch. 98, all such objections to the plaint and incidental proceedings, if not raised before the Justice of the Peace are not available and are considered waived, and cannot therefore be taken advantage of by *certiorari* when that writ has been taken away by statute, as it is the case under said chap. 6, Cons. S. of L. C., sec. 49. Paley p. 78. 2 Chitty's Genl. Practice, p. 225.

8. That the Judge of the Sessions of the Peace has the power of giving any one, out of three different judgments, according to the provisions of sections 32, sub-section 2, 28, 39 and 40, ch. 6 Cons. S. of L. C., 2 Chitty's Genl. Practice, p. 213.

9. That this alternative power is "subject to the discretion vested in him," by said sub-section 2.

10. That by sub-section 2 of section 37, ch. 6, Cons. S. of L. C., the costs as are awarded "and all costs, whether incurred upon or after conviction," are to be levied in the same way as the penalty by distress or corporeal punishment. Vide Oake's Synopsis, p. 106, note C; where the inconvenience of a different law in England is noticed, which is the Imp. Act 18 Geo. 3, ch. 19, vide also Paley p. 240, 241, *Burns' Justice v. Ale-houses*, p. 90, Ed. of Chetwynd, 1825, as to the form of commitment, &c., upon a similar charge.

11. The Justices, under the provisions of sections 53 and 54 of chap. 103 of the Cons. S. of Canada, have the right to grant costs even to the attorneys, either upon conviction or upon the dismissal of the plaint.

See Saunder's Practice of Magistrates' Courts, p. 69, 70, upon the same law, *Jervis' Acts in England*.

12. That the Justices must be guided, by the statute which gives them jurisdiction in the particular proceeding. The ch. 6, Cons. S. of L. C. is complete by itself, and the forms therein given are held sufficient in law, 2 Chitty's Genl. Practice, p. 209.

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13. The Judge of the Sessions of the Peace, by section 61, ch. 102, and by section 82, chap. 103 of the Cons. S. of Canada, and by section 3, chap. 102 of the Cons. S. of L. C., is vested with all the powers of two Justices of the Peace.

Writ refused.

B. Devlin for Moley.

LaFrenaye for Bellemare.

(P. R. L.)

MONTREAL, 31st DECEMBER, 1862.

Coram, BADGLEY, J.,

No. 233.

DOMINA REGINA,

On application of WILLIAM G. SLACK

For a Writ of Certiorari.

AND

RAPHAEL BELLEMARE

Prosecutor in the Court below.

Held:—That a conviction for one month instead of two months' imprisonment is bad, inasmuch as a judgment for too little is as faulty as a judgment for too much. (*)

20. That such a conviction must be quashed for want of jurisdiction.

30. That if it had been an order instead of a conviction it could have been amended by the Superior Court. (†)

40. That in such a case, no costs are to be given against a Collector of Inland Revenue prosecuting in the execution of a public duty.

50. That the Judge of the Sessions of the Peace being vested with all the powers of two justices of the peace by sec. 61, ch. 102 and by sec. 82, ch. 103 of the Consolidated Statutes of Canada, and by sec. 3, ch. 102 of the Cons. Stat. of Lower Canada; no appeal lies from such a conviction rendered by him under ch. 6 of the Consolidated Statutes of Lower Canada.

This was a rule to quash a conviction by Charles Joseph Coursol, Esquire, judge of the Sessions of the Peace in and for the city of Montreal, at a special Session of the Peace, for offending against the provisions of Chap. 6 of the Consolidated Statutes of Lower Canada. The prosecution in the Court below alleged that the said William G. Slack did at the City of Montreal in the said First Division, in the District aforesaid, to wit: in the house and premises there situated and occupied by him, the said William Slack, on the twenty-second day of November, in the year one thousand eight-hundred and sixty-two, and at sundry times before and since, keep a place of public entertainment, without having previously obtained the License required by the Provisions of the Statute in such case made and provided, contrary to the Statute in such case made and provided, whereby and by force of the said Statute, the said William G. Slack hath become liable to pay the sum of fifty dollars. Proof was made by the informer that he took a supper in the Defendant's house on the day named in the information, for which he paid one shilling to the Defendant; and that the table is always laid out for the reception of travellers, whom he saw eating there at the same table. This proof was corroborated by another witness.

The conviction declared that, on the tenth day of December in the year one thousand eight hundred and sixty-two, at the City of Montreal, in the said District

(*) Paley on Convic: Ed. of 1855 p. 231 and Note N.

(†) Paley on Convic., Ed., of 1856, pages 143, 232.

h. 102, and by
3, chap. 102 of
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Writ refused.

of *Certiorari*.

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of Montreal, William G. Slack of the City of Montreal in the District of Montreal, within the first Division of the said District of Montreal for revenue purposes, Trader, is convicted before the undersigned, Charles Joseph Coursol, Esq., Judge of the Sessions of the Peace in and for the City of Montreal, for that he the said William G. Slack did at the City of Montreal aforesaid in the house and premises there situate and occupied by him and within the said first Division of the said District of Montreal for Revenue purposes, on the twenty-second day of November last past and at sundry times before and since, keep a place of public entertainment, without having previously obtained the License required by the provisions of the Statute in such case made and provided, contrary to the Statute in such case made and provided, whereby he, the said William G. Slack hath forfeited, and I, the said Judge of the Sessions of the Peace in and for the City of Montreal, do adjudge the said William G. Slack for his said offence to have forfeited and to pay to Raphael Bellemare of the said City of Montreal, Collector of Inland Revenue for the first division of the said District of Montreal for Revenue purposes, the sum of fifty dollars, current money of this Province, and also to pay to the said Raphael Bellemare the sum of eight dollars and ninety three cents, amount of costs by me allowed and adjudged to be paid to the said Raphael Bellemare for his costs in this behalf. And, in default of immediate payment of the said several sums, I order that the same be levied by distress and sale of the goods and chattels of the said William G. Slack; and in default of such goods and chattels, or in case of their being insufficient I do further order and adjudge, that the said William G. Slack be committed to the Common Gaol at the said City of Montreal, for a period of one month, unless the said several sums of money, and the costs and charges of the said distress, commitment, and of the conveying the said William G. Slack to the said Common Gaol, shall be sooner paid.

Given under my Hand and Seal, the day and year first above mentioned, at the City of Montreal, in the District of Montreal aforesaid.

(Signed), CHARLES J. COURSOL.

Judge of the Sessions of the Peace.

The notice of motion for a writ of *Certiorari* was served upon the Judge of the Sessions of the Peace for the City of Montreal, on the 10th December, 1862, the day upon which the conviction was rendered; so that if an appeal could lie against that judgment according to the provisions of Sections 50 and 51 of said Chap. 6, Consolidated Statutes of Lower Canada, the notice of motion was premature, as the delay, for an appeal, (the 24 hours' notice) had not yet elapsed when that notice was served upon the judge of the Sessions of the Peace.

This point was submitted at the time of the argument upon the merits of the certiorari. The affidavit of circumstances set up the following grounds of objection, viz:—

10. Because the said Charles Joseph Coursol, Esquire, had no jurisdiction on the subject matter of the said pretended complaint and could not by law take cognizance thereof.

20. Because no legal offence was alleged against this deponent.

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Black,
and
Bellemare.

30. Because there was no allegation in the said Declaration or summons to indicate the commission of an offence against any law in force in this Province or which could give to the said Charles Joseph Coursol jurisdiction to condemn the said Deponent to the payment of the said fine and costs, or in default thereof to an imprisonment of one month in the Common Gaol of said District.

40. Because there was no fact alleged in the said Declaration or summons, to show that Deponent kept a house or place of public entertainment which required him to procure a license or which showed that in not doing so he had offended against any statute in force in this Province.

50. Because the said judgment is excessive and not warranted by any law in force in this Province and is moreover oppressive and is entirely unsupported by any fact to justify the rendering of such judgment.

Devlin, in support of the rule, urged the following reasons:—

1st. That the Defendant did not keep a place of public entertainment and could not be convicted of such an offence.

2nd. That no proof of such an offence had been made against the petitioner.

3rd. That the conviction was bad, inasmuch as it was not warranted by any law in force in this Province.

4th. That the conviction was also bad in awarding costs to the attorney for the prosecutor in the court below.

Lafrenaye, for Prosecutor, contended upon the merits of the prosecution and the proof thereof:—(1)

1st. The Prosecutor is not bound to prove all the ingredients constituting a house of public entertainment according to the requirements of sect. 25, ch. 6, Consolidated Statutes of Lower Canada, no more than in an indictment he is bound to prove the number of the articles stolen.

Proving the larceny of one or more of the articles, is sufficient to constitute the offence, although the prosecution fail in his proof of the rest. *Vide* Archbold's pleading and evidence, p. 50, Ed. of 1862.

2nd. In proving that the Defendant was "constantly supplied with a sufficient quantity of provisions," being one of the necessary ingredients of the duty of the keeper of a house of public entertainment, the offence was sufficiently

(1) *Coursol*, J. S. P.—The law requires that all parties keeping a house of public entertainment must have a license, and in default shall be liable to a fine of \$50.

The question has been raised, whether from the evidence the Defendant has kept a house of public entertainment within the meaning of the Statute. I consider that he has done so from the fact that people go in there and pay for what they get in the way of eating and drinking. The proof shows clearly that the informer was not there as a guest, but that he paid for his meal. The Defendant did *entertain* him in his house by way of gain and reward. It is proved that the table is always laid out for lunch and that travellers take their lunch there.

The other point raised was as to whether the information ought to have explained what a "place of public entertainment" is according to law. This objection was made after the plea of "not guilty" had been entered, and the proof on the part of the prosecution had been adduced. However, I have no hesitation in saying that the information as laid against the Defendant for having kept "a house of public entertainment" is quite sufficient, because it is so mentioned in the Statute, which requires no further allegation.

proved, although the Prosecutor did not prove the rest of the requirements of said sect. 25, ch. 6.

3rd. If the Defendant wishes to avoid being sued for the penalty of \$20 mentioned in said section 25, he must keep the different accommodations therein provided.

This proposition constitutes another offence if he has a license.

4th. If he has no license, the keeping of "any of the accommodations provided by said section 25" constitutes the offence contemplated by the section 22 of the said chapter 6, and subjects such person who attempts to entertain the public by way of gain or reward to a penalty of \$50.

5th. Sections 25 and 12 apply partly to the country and not to the city.

Lafrenaye, for the Prosecutor, further contended that inasmuch as the prosecutor was a public officer suing in the execution of a public duty, and that the conviction was bad from a mistake which may sometimes occur in the multiplicity of the business to be disposed of by the same magistrate in a very short time, no costs could be granted against him to the petitioner; and cited the following authorities:

Con. Stat. L. C. ch. 89, sect. 4.

Same ch. 88, sect. 3.

Ex parte DeBeaujeu, 1 L. C. Jurist, p. 15. 30th December, 1856.

Coram Day, J., Smith, J., Badgley, J.

Ex parte Leonard, 1 L. C. Jurist, p. 255. 30th Sept., 1857.

Coram Day, J., Smith, J., Mondelet, J.

Ex parte Hogue, divers others and Bellehumeur, Nos. 412 and 653. 13th April, 1853.

Coram Day, J., Smith, J., Mondelet, J.

REVENUE CASES.

No costs granted.*

Coram Day, J., Smith, J., Mondelet, J.

This case had come before the court on certiorari, to quash the conviction for selling liquor without license; the court had previously quashed these convictions, but they now came up again to decide whether they should be quashed with costs against the Revenue Inspector in whose name the information had been laid. The Revenue Inspector was a public officer, and had brought these informations under the 14 and 15 Vict., ch. 100. They had been laid according to the forms to be found in that Statute.

The real point to be considered was this: Did the Revenue Inspector render himself liable for the costs in the quashing of these convictions while suing as a public officer of the Crown?

The court was of opinion that by the common law of England, by which this Statute ought to be interpreted, the Defendants could obtain no costs against the Crown.

By a Statute of Elizabeth, officers who sued in the name of the Crown, could not be held liable for the costs, and it was a settled rule that the Crown could not give or take costs. But it was also a rule that informers who issued *qui tam* informations were liable, but not even then, when a part of the penalty went to the Crown.

By reference to the Provincial Act, under which the present informations were taken, it appeared that one part of the penalty went to the Crown, and in some instances the whole.

By the 31st section, the Inspector was compelled to examine taverns and institute these actions against parties who violated that Statute.

* *Ex parte Hogue* and others. Montreal, 13th April, 1853.

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Now it seemed hard that he should be compelled to pay costs in actions which he was compelled to make as a public officer. He certainly came within the rules referred to, where costs were not recoverable. The convictions in these cases must be quashed without costs. Bacon's abridg. *vo. costs*, letter E, No. 3.

Ex parte Walsh; full bench. 26th April, 1853. Conviction granted but without costs against the Revenue Inspector.*

This case came up on a question of costs against the Revenue Inspector, similar to that in *Ex parte* Hogue and others.

In that case the court decided that, in quashing informations made by the Revenue Inspector, they would give no costs. The court observed that there was no doubt that the present conviction would have to be quashed but that after another careful consideration of the arguments, the court had determined to adhere to its former decision respecting the costs.

BADGLEY, J.—There is no doubt that the conviction is bad and must be quashed, but without costs. If it had been an order instead of a conviction the court would have felt bound to correct the mistake and to give the judgment which ought to have been given by the magistrate. But the court cannot amend a conviction, and therefore has no alternative but to quash it.

No appeal lies from the decision given in such a case by the judge of the Sessions of the Peace, and the certiorari was the proper proceeding to bring the conviction before this court.

The judgment is *motivé* as follows :

The Court, considering that the conviction complained of by the Petitioner in this cause, rendered against him on the 10th day of December instant, by the judge of the Sessions of the Peace in and for the city of Montreal, whereby amongst other things, the said Petitioner is subjected to an imprisonment of one month, is not founded on any law, and is moreover contrary to law; and considering that the said conviction is in law an entire judgment and indivisible, and being faulty as above is vitiated in the whole, doth quash the said conviction without costs.

B. Devlin, attorney for Slack.

Lafrenaye, attorney for Bellemare.
(P.R.L.)

MONTREAL, 20TH JANUARY, 1863.

IN CHAMBERS.

Coram SMITH, J.,

Ex parte THOMPSON,

AND

R. BELLEMARE,

AND

C. J. COURSOL,

Judge of the Sessions of the Peace, Convicting Magistrate.

Held :—That an appeal lies to the General Quarter Sessions of the Peace from a conviction rendered by the Judge of the Sessions of the Peace in and for the City of Montreal under section 60 of ch. 6 of the Con., S. of Lower Canada.

The petitioner having been convicted on the 17th December, 1862, at the suit of R. Bellemare, Esquire, Collector of Inland Revenue for the first division

* *Ex parte* Walsh, for certiorari. Montreal, 26th April, 1853.

On appeal.

Prosecutor.

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of the District of Montreal, before C. J. Coursol, Esquire, Judge of the Sessions of the Peace in and for the City of Montreal; for having on the 20th day of November 1862, sold by retail in a quantity less than three gallons at one time certain spirituous liquor, to wit: one glass of whisky; presented a petition to any one of the Honorable the justices of the Superior Court residing in the District of Montreal; to be permitted to appeal from the said conviction for the various reasons therein set forth; to the next court of General Quarter Sessions to be holden at the City of Montreal on the 4th February, 1863.

The only question which was raised upon the presentation of the petition was as to the right of appeal under section 50 of the "act respecting tavern keepers" and the sale of intoxicating liquors," ch. 6. of the Consolidated Statutes of Lower Canada, inasmuch as the conviction was rendered by the Judge of the Sessions of the Peace and not by two justices of the Peace.

Kerr for Petitioner urged: That under the statute ch. 6. Sec. 50, Consolidated Statutes of Lower Canada, there was an appeal from all such convictions, unless made "by two justices of the Peace, or by any Inspector and Superintendent of Police or stipendiary Magistrate, and another Justice of the Peace". That although the Judge of the Sessions of the Peace (formerly the Inspector and Superintendent of Police) is vested with all the powers and authorities within the limits of his jurisdiction, of any one or two Justices of the Peace, by Section 3rd of ch. 102 of the Consolidated Statutes of Lower Canada, yet by the particular Statute under which, the conviction was made; it is apparent that the Judge of the Sessions of the Peace must sit with another Justice of the Peace, so that such a conviction be the result of two minds who have examined the case and weighed the evidence.

LaFrenaye for Prosecutor contended that the "act respecting the Consolidated Statutes for Lower Canada," ch. 1. C. S. of L. C., Sec. 14, provided that, "if upon any point there be a difference between the English and French versions of the said Statute, that version which is most consistent with the acts consolidated in the said statute shall prevail" and inasmuch as the French version of the Consolidated Statutes, of Lower Canada, ch. 6, Sec. 50, was most consistent with the acts consolidated and under whose provisions no appeal subsisted, to wit: the 20 Vic., ch. 46, Sec. 6; it followed that no appeal could be granted to the Petitioner. (*)

That moreover by the 3rd Sec. of ch. 102 Consolidated Statutes of Lower Canada "all judgments and convictions rendered by the Judge of the Sessions of the Peace, have the same force and effect as if rendered by one or two Justices of the Peace;" and consequently, that provision in the act regulating the powers and authority of the Judge of the Sessions of the Peace was applicable to the question at issue and had the effect of taking away the pretended right of appeal, if any ambiguity could exist in the interpretation of the 50th Sec. of ch. 6, Consolidated Statutes of Lower Canada.

(*) The Comma in the French Version and in the 6th Sec. of the 20 Vic., ch. 46 being found after the words "or by any Inspector and Superintendent of Police," and not after the words "or stipendiary Magistrate."

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and
Baldwin

SMITH, J.—This appeal is granted, as I am of opinion that the French version of the 6th ch. of the Consolidated Statutes of Lower Canada do not reproduce the acts consolidated, as contended by the prosecutor and although the Judge of the Sessions of the Peace is vested with all the powers of two Justices of the Peace; yet under the Statute under whose provisions the conviction has been made, an appeal lies, if he sits alone upon the case.

Kerr, Attorney for Petitioner.

LaFrenaye, Attorney for Prosecutor.

(P.R.L.)

MONTREAL, 31 DECEMBRE, 1862.

Coram MQNK, J.

No. 458.

Dumont vs. Dumont.

PARTAGE DE BIENS SUBSTITUÉS.

- JUGE:—1o Que dans l'espèce, une substitution fidéi-commissaire étant faite en terme collectif, les biens substitués doivent se partager entre les appelés par souches et non par têtes, ou
2o—Que la transmission des biens laissés à deux enfants à charge de substitution graduelle en faveur de leurs descendants, se fait par souches.
3o—Que dans l'espèce, la substitution s'ouvrant en faveur d'un des appelés avant de s'ouvrir pour les autres, cet appelé peut immédiatement demander sa part, sans attendre l'ouverture de la substitution en faveur de ses co-appelés.

Cette cause est une action en partage de biens substitués, intentée par Dame Marguerite Virginie Dumont, épouse de Charles Auguste Maximilien Globenski, contre Dame Elmiro Dumont (Madame Laviolette), comme grevée de substitution, Godefroi Laviolette comme tuteur *ad hoc*, et Joseph Lefebvre de Bellefeuille, comme tuteur à la substitution.

Les faits qu'il est nécessaire de connaître pour bien comprendre la nature de cette cause, sont les suivants :

Louis Eustache Lambert Dumont, le bisaïeul de la Demanderesse, est décédé à St. Eustache, le 12 Avril, 1807 laissant deux enfants vivants, Nicolas Eustache Lambert Dumont, et Marie Louise Angélique Lambert Dumont, épouse de Antoine Lefebvre de Bellefeuille.

Son testament olographe, en date du onze Octobre 1805, contenait entre autres les dispositions suivantes :

" Désirant conserver le bien de ma famille, et voulant pouvoir à l'avantage de mes enfants, petits enfants et arrière-petits-enfants,

" J'ordonne, par ces présentes, que Nicolas Eustache Dumont, et Marie Louise Angélique Dumont, mon fils et ma fille, ne pourront vendre, engager ni aliéner aucune partie des moulins et de ma seigneurie que je délaisserai à mon décès, qui pourront leur échoir pour part et portion héréditaire de ma succession, eux et leurs enfants nés et à naître, et qu'ils se contentent de jouir eux et leurs descendants, jusqu'au terme fixé, du revenu seulement de leurs dites parts et portions héréditaires : aux charges de toutes redevances dont les dits biens peuvent être grevés.

"J'ordonne pareillement, qu'après le décès des dits Nicolas Eustache Lambert Dumont, et Marie Louise Angélique Lambert Dumont, leurs enfants nés en légitime mariage, jouiront aussi leur vie durant de leur part, et portion héréditaire dans les dits biens.

"Quand au fond et propriété du dit fief et des moulins, je les donne et lègue à mes arrière-petits-enfants à naître en légitime mariage de mes petits enfants, pour en jouir, faire et disposer par eux leurs hoirs et ayant cause en pleine propriété, après le décès toutefois de leur père et mère descendant de ma ligne, auxquels ainsi qu'à mes enfants sus-nommés leurs ayeuls et ayeules, je substitue par ces présentes les dits arrière-petits-enfants, ainsi est ma volonté."

Après le décès du testateur, ses deux enfants, Nicolas Eustache Lambert Dumont et Marie Louise Angélique Lambert Dumont, entrèrent en possession des biens de leur père à charge de substitution, et les possédèrent et en jouirent leur vie durant.

Nicolas Eustache Lambert Dumont, le fils du testateur, laissa lors de son décès trois enfants, savoir, Elmire Dumont, la Défenderesse, Louis Charles Lambert Dumont, le père de la Demanderesse, et Sévère Dumont, mort depuis sans enfants. Du mariage de Dame Elmire Dumont avec feu Pierre Laviolette sont nés sept enfants encore vivants, dont Godefroi, l'un des Défendeurs en cette cause, est l'aîné. Louis Charles Lambert Dumont, n'a laissé qu'un enfant, savoir, Dame Marguerite Virginie Dumont, la Demanderesse.

Dame Marie Louise Angélique Lambert Dumont, la fille du testateur, laissa à son décès, quatre enfants issus de son mariage avec Antoine Lefebvre de Bellefeuille, savoir : Eustache Antoine Lefebvre de Bellefeuille, le dit Joseph Lefebvre de Bellefeuille, l'un des Défendeurs, et Louis Charles et François Louis Lefebvre de Bellefeuille, morts tous deux sans enfants. Eustache Antoine Lefebvre de Bellefeuille a laissé trois enfants, issus de son mariage avec Dame Marguerite McGillis, qui sont encore vivants.

Du mariage de Joseph Lefebvre de Bellefeuille avec Dame Caroline Flavie Leprohon, sont nés trois enfants aujourd'hui vivants.

Il y avait donc vivants, lors de l'institution de cette action, deux petits enfants du testateur et quatorze arrière-petits-enfants provenant de quatre différentes souches, deux ayant pour auteur commun le fils, et les deux autres la fille du testateur ; tous soumis à la loi du testament, dont une partie a été rapportée au commencement de ce résumé.

Les biens du testateur qui consistaient en la Seigneurie des Mille-Isles furent partagés en 1808 par MM. Delisle et Chaboillez, arbitres nommés par les parties. En vertu de ce partage, Nicolas Eustache Lambert Dumont prit possession des deux tiers des biens régis par le testament, et Madame de Bellefeuille eut l'autre tiers.

La présente action repose sur l'idée que, la part des biens du testateur échue par le partage à Nicolas Eustache Lambert Dumont s'est trouvée pour toujours attribuée à sa souche. Voici comment la Demanderesse développait cette idée dans sa déclaration en date du premier Octobre 1861 :—

Depuis la mort du dit Nicolas Eustache Lambert Dumont, ses dits trois enfants, sont entrés en possession et en jouissance des dits biens qu'ils ont

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recueillis à charge de substitution en faveur de leurs enfants, par et en vertu du testament de leur aïeul, le dit feu Louis Eustache Lambert Dumont, à la succession duquel ils venaient à titre de grevés en vertu du dit testament, et qu'ils en ont ainsi joui et les ont ainsi possédés en commun et par indivis jusqu'au 1er Novembre 1841, jour du décès du dit Louis Charles Lambert Dumont, puis ensuite la dite Défenderesse et la dite Demanderesse comme représentant le dit feu Charles Lambert Dumont, son père, et le dit Louis Sévère Dumont, jusqu'au 26 Décembre 1841, jour du décès du dit Louis Sévère Dumont, et depuis lors la dite Défenderesse et la dite Demanderesse, lesquelles en leurs titres et droits respectifs, en jouissent et les possèdent encore en commun et par indivis, et sont maintenant en leurs dits titres et droits respectifs les seuls héritiers et représentants légaux du dit testateur, quant aux dits biens comme étant les seuls descendants du dit Nicolas Eustache Lambert Dumont, à qui ils sont échus par le dit partage.

Que la substitution créée et établie par le dit testament du dit feu Louis Eustache Lambert Dumont est relativement à la dite Demanderesse arrivée à son dernier degré, la dite Demanderesse étant la dernière appelée à recueillir la part et portion des biens à elle afferant dans les dits biens. Que la dite Demanderesse a droit à la moitié des dits biens à elle transmise et parvenue de ses père et aïeul en vertu du testament ci-haut relaté.

De ces prémisses la Demanderesse concluait à être déclarée en son nom personnel propriétaire définitive par et en vertu du testament du dit Louis Eustache Lambert Dumont, d'une moitié de tous les biens échus au lot de Nicolas Eustache Lambert Dumont dans le partage de 1808 mentionné plus haut, et à en avoir la propriété, jouissance et possession définitive, séparément et par divis d'avec les Défendeurs, tant en leurs propres noms qu'en leurs dites qualités, et qu'en conséquence les dits Défendeurs tant en leurs propres noms qu'en leurs dites qualités, fussent tenus de convenir d'experts avec la Demanderesse pour fixer et établir la part pour moitié qui appartiendrait définitivement à la Demanderesse d'une part, et aux Défendeurs de l'autre, sinon, que les dits experts fussent nommés par la cour. Elle concluait enfin à la vente des biens, s'il était constaté que les biens ne pouvaient commodément se partager.

A cette action, les Défendeurs plaidèrent séparément ; Madame Laviolette et Godefroi Laviolette, d'une part, soutinrent dans leurs défenses des prétentions absolument identiques.

Admettant les faits relatés dans la déclaration des Demandeurs, les Exceptions Péremptoires de Madame Laviolette et de Godefroi Laviolette, *de qualité*, allaient à dire :—Que depuis la dite sentence arbitrale et conformément à icelle et à l'esprit et l'intention du dit testament ci-dessus récitée en partie, le dit Nicolas Eustache Lambert Dumont a eu la jouissance et la possession des immeubles ci-dessus désignés à titre de légataire du dit feu son père, à charge de substitution comme ci-dessus mentionné en faveur des arrière-petits-enfants du dit testateur, lesquels devront partager les dits biens lors de l'ouverture de la dite substitution par têtes et non parouches, et ce jusqu'à sa mort, arrivée le ou vers le vingt-troisième jour d'Avril 1835, dans la dite paroisse de St. Eustache, laissant de son côté, pour seuls et uniques descendants du dit testateur, trois en-

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fants issus de son mariage avec feu Dame Marie Narcisse Lemer St. Germain, et petits enfants du dit testateur, savoir : la dite Défenderesse en cette cause, née au dit St. Eustache le ou vers le 13 de Novembre, 1803, où elle a été baptisée sous le nom de Marie Elmire Dumont ; Charles Louis Lambert Dumont, né à St. Eustache le 12 Septembre 1808, où il a été baptisé le même jour (père de la dite Demanderesse) décédé au dit St. Eustache le premier Novembre 1841, où il a été inhumé sous le nom de Louis Charles Lambert Dumont ; Sévère Dumont, né au dit St. Eustache, le 7 Octobre 1810, et décédé le 26 Décembre 1841, au même lieu, où il a été inhumé sous le nom de Louis Sévère Dumont.

Que depuis la mort du dit Nicolas Eustache Lambert Dumont, ses dits trois enfants sont entrés en possession et en jouissance des dits biens, qu'ils ont recueillis à charge de substitution en faveur de leurs enfants par et en vertu du testament de leur aïeul, le dit feu Louis Eustache Lambert Dumont, à la succession duquel ils venaient à titre de grevés en vertu du dit testament, et qu'ils en ont ainsi joui et les ont aussi possédés en commun et par indivis jusqu'au premier Novembre 1841, jour du décès du dit Louis Charles Lambert Dumont ; puis ensuite la dite Défenderesse, et le dit Louis Sévère Dumont, jusqu'au 26 Décembre 1841 jour du décès du dit Louis Sévère Dumont, et depuis lors la dite Défenderesse et la dite Demanderesse, lesquelles en leurs titres et droits respectifs en jouissent et les possèdent encore en commun et par indivis.

Que par la mort du dit Louis Charles Lambert Dumont la substitution créée par le testament du dit Louis Eustache Lambert Dumont s'est ouverte relativement à la Demanderesse, Virginie Dumont, enfant unique issue du mariage du dit Louis Charles Lambert Dumont avec la dite Mary Sophia Roy Bush et arrière-petite-enfant du testateur, appelée à la dite substitution pour une part virile avec les autres arrière-petits-enfants du dit testateur, descendant de leur père le dit Nicolas Eustache Lambert Dumont son fils aîné.

Que les autres arrière-petits-enfants du dit testateur aussi appelés pour chacun une part virile dans les biens qui sont tombés dans le lot du dit Nicolas Eustache Lambert Dumont à charge de substitution, sont les seuls enfants vivants issus du mariage de la dite Dame Elmire Dumont avec feu Pierre Lavolette, savoir, Godefroi, Caroline, Laure, Camille, Alphonse, Arthur, Alfred Lavolette, lesquels seront en droit de réclamer chacun une part virile des dits biens en concurrence avec la dite Dame Virginie Dumont, c'est-à-dire, que quand la substitution s'ouvrira en leur faveur, les dits Godefroi, Caroline, Laure, Camille, Alphonse, Alfred, Arthur Lavolette, seront appelés à recueillir chacun un huitième des dits biens, c'est à savoir, de ceux dont la Demanderesse demande le partage par la présente demande, le dernier huitième devant appartenir à cette dernière.

Que la Demanderesse, qui n'a droit comme susdit qu'à un huitième dans les dits biens, conclut erronément à être déclaré propriétaire de la moitié d'iceux et à partager en cette proportion.

Puis les Défendeurs après avoir déclaré ne pas s'opposer au partage, pourvu qu'il se fit suivant leurs prétentions, concluent, à ce que par le jugement à intervenir il soit déclaré que la Demanderesse n'est propriétaire que d'un huitième dans les biens qui ont été légués au dit Nicolas Eustache Lambert Dumont à

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charge de substitution comme susdit, la propriété des sept autres huitièmes référant maintenant en la personne de la Défenderesse (Madame Laviolette) à charge de substitution, et devant s'ouvrir au profit et avantage de ses dits enfants ou de ceux d'entre eux qui seront vivants lors de l'ouverture de la dite substitution à leur égard, et que le partage qui aura lieu se fasse par têtes et non par souches, ainsi qu'injustement réclamé par la Demanderesse.

Les Demandeurs, par leurs réponses aux exceptions des deux Défendeurs, Elmiro Dumont et Godefroi Laviolette, niaient qu'ils pussent soulever les prétentions par eux énoncées dans leurs Exceptions relativement à la portion de Virginie Dumont dans les biens dont elle demande le partage.

Les Demandeurs alléguaient de plus que le droit à la propriété de la moitié des biens, a été déterminé en dernier ressort en faveur de Virginie Dumont, dans une cause mue en la Cour Supérieure pour le district de Montréal, et jugée par cette Cour le quatre Janvier 1853, dans laquelle cause, la dite Défenderesse conjointement avec son époux, feu Pierre Laviolette, étaient Demandeurs, contre la Demanderesse actuelle alors représentée par son tuteur, feu Eugène Globenski. Que cette cause ayant ensuite été portée en appel, la cour du Banc de la Reine rendit le jugement suivant :

" Considérant . . . qu'au décès du dit Nicolas Eustache Lambert Dumont, les biens désignés en la déclaration en cette cause, sont en vertu de la dite substitution passés et ont été dévolus par égales portions, à ses trois enfants, savoir : la Demanderesse Intimée, (Madame Laviolette), le dit Louis Charles Lambert Dumont nommés en la dite déclaration, et ce à la charge de substitution, au profit de leurs enfants, arrière-petits-enfants du testateur ; que, par le décès du dit Louis Charles Lambert Dumont, sa part dans les dits biens, consistant en un tiers indivis d'iceux, est passée et a été de même dévolue à la dite Virginie Dumont, sa fille, et que par le décès subséquent du dit Sévère Dumont, sans enfants, sa dite part dans les dits biens, consistant en un tiers indivis d'iceux, est passée, et a été dévolue de même par égales portions, à sa sœur la Demanderesse, et à sa mère la dite Virginie Dumont, et qu'en conséquence depuis cette dernière époque, les susdits biens sont possédés par la dite Demanderesse l'Intimée, et la dite Virginie Dumont, par moitié et par indivis, savoir, par la dite Demanderesse (Intimée) à charge de substitution, au profit de ses enfants et par la dite Virginie Dumont, en pleine propriété." (4. L. C. Rép. p. 384)

Les Demandeurs continuant de répondre aux Exceptions des Défendeurs Elmiro Dumont et Godefroi Laviolette, alléguaient encore que depuis la sentence arbitrale du 5 janvier 1808, le dit Nicolas Eustache Lambert Dumont a eu la jouissance des dits immeubles, à titre de légataire grevé de substitution en faveur de ses enfants et petits enfants, arrière-petits-enfants du testateur, lesquels seuls, savoir aujourd'hui, la Demanderesse comme représentant le dit Nicholas Eustache Lambert Dumont, doit avoir toute la part du dit Nicholas Eustache Lambert Dumont, qu'elle représente avec la Défenderesse Elmiro Dumont, et non pas ainsi que celle-ci le prétend, prendre seulement une part virile dans la dite succession, conjointement avec tous les arrière-petits-enfants du testateur. De plus, que la Demanderesse ne peut être tenue d'attendre le décès de la Défenderesse.

deresse pour sortir de l'indivis, étant propriétaire absolue de la moitié de ces biens, elle a droit d'en obtenir le partage définitif.

A ces réponses des Demandeurs, sous-réponses générales des deux Défendeurs, Elmire Dumont et Godefroi Laviolette.

A l'enquête, les faits qui forment la base de cette action, et que nous avons rapportés au commencement de ce résumé, furent admis de part et d'autre.

D'un autre côté, le Défendeur Joseph Lefebvre de Bellefeuille, en sa qualité de tuteur à la substitution, plaida séparément des deux autres Défendeurs. Après avoir admis les faits qui forment la base de cette action, il alléguait à l'encontre des prétentions des Demandeurs :—Que la seule interprétation du testament de Louis Eustache Lambert Dumont qui soit véritable et conforme à la loi est, qu'une substitution a été créée par le testateur, dont les enfants du testateur sont chargés en faveur de tous les arrière-petits-enfants collectivement, le testateur les ayant tous appelés à recueillir concurremment et collectivement ses biens, au décès de ses petits enfants. Qu'en conséquence le droit des arrière-petits-enfants est un droit égal et de même nature qui s'ouvrira pour tous à une seule et même époque, savoir, à l'époque du décès du dernier des petits enfants du testateur.

Que le partage fait en 1808, était nécessairement un partage temporaire, uniquement fait pour servir aux parties à icelui ; et que, par conséquent, ce partage ne saurait aucunement servir de base à une attribution de parts entre les appelés, qui n'y ont jamais été parties, ni par eux-mêmes, ni par leurs représentants légaux.

Puis le Défendeur J. L. de Bellefeuille, alléguait la renonciation de Louis Charles Lambert Dumont à la succession de son père Nicolas Eustache Lambert Dumont, pour s'en tenir uniquement aux dispositions du testament ; celle de Virginie Dumont, la Demanderesse à la succession de son père, et une foule d'autres de la part des ascendants et des collatéraux de la Demanderesse ; lesquelles renonciations doivent avoir pour effet de faire régler et décider les droits des petits enfants et arrière-petits-enfants uniquement par les termes du testament, et conformément à la nature et à l'étendue de la substitution créée par ce testament.

Le Défendeur J. L. de Bellefeuille, dit de plus :—Que la possession qu'ont pu avoir des biens substitués, les petits enfants et arrière-petits-enfants, a nécessairement été une possession temporaire et précaire, et n'a pu conférer aucun droit à tout tel possesseur contraire aux termes du testament ; que jusqu'au décès de Dame Elmire Dumont, et de lui-même, le dit Joseph Lefebvre de Bellefeuille, Dame Virginie Dumont n'a aucun droit actuel formé ou en espérance qui puisse servir de base à sa demande en partage ; qu'aucun partage définitif et final autre qu'un partage définitif de l'ensemble des biens substitués, attribuant à chacun des arrière-petits-enfants la part qu'il a droit d'avoir, ne peut se faire et par la loi et par les termes du testament.

Le Défendeur soutint ensuite qu'en vertu des clauses ci-haut citées du testament, les arrière-petits-enfants du testateur ont précisément les mêmes droits que Dame Virginie Dumont, la Demanderesse ; que les enfants de Dame Elmire Dumont, d'Eustache Antoine Lefebvre de Bellefeuille et de Joseph Lefebvre

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de Bellefeuille, sont tous en semblable degré vis-à-vis du testateur avec Dame Virginie Dumont; que si la Demanderesse est appelée par le testament, c'est uniquement dans et par la clause qui appelle ses cousins et cousines. Qu'en vertu de cette clause, tous les arrière-petits-enfants du testateur sont appelés comme tels arrière-petits-enfants, et que tous les droits que peut avoir ou prétendre avoir la Demanderesse, elle ne peut les avoir ou prétendre avoir qu'en sa qualité d'arrière-petite-enfant du testateur et en vertu de la clause ci-haut réci-tée, et non autrement; qu'à l'ouverture de la substitution créée par le testa-ment en faveur des arrière-petits-enfants, la Demanderesse en sa qualité d'ar-rrière-petite-enfant, prendra de son chef et non autrement, en vertu de la dite clause, de la même manière et dans la même étendue que prendront ses cousins et cousines, les autres arrière-petits-enfants, et que ces derniers et chacun d'eux auront droit à une part dans l'ensemble des biens substitués égale à celle de la Demanderesse, au cas où elle survivrait les petits-enfants du testateur.

Qu'en conséquence la part à être attribuée par la cour à la Demanderesse, dans l'ensemble des biens substitués, ne saurait être plus considérable que celle de tous et chacun des autres arrière-petits-enfants du testateur; et que les préten-tions au contraire émises par la Demanderesse en sa déclaration sont mal fon-dées, et qu'aucun autre partage qu'un partage attribuant à tous et chacun les arrière-petits-enfants du testateur en degré égal avec la Demanderesse, une part égale à celle qui sera attribuée à la Demanderesse, ne saurait être ordonné par la cour, et qu'en conséquence au cas où un partage serait ordonné, nulle part plus forte que celle d'un quatorzième ne saurait être attribuée à la Deman-deresse dans l'ensemble des biens substitués.

Le Défendeur J. L. de Bellefeuille, se plaint ensuite de certaines injustices commises, suivant lui, dans le partage des moulins et des rentes constituées fait en 1808, prétendant que ce partage n'avait pas été fait suivant les termes du testament. Après avoir établi, à l'enquête, la perte que ce partage avait pu faire subir à une branche de la famille, les autres faits sur lesquels repose l'ac-tion étant admis, le Défendeur conclut au débouté de l'action, et au cas de par-tage définitif des biens substitués, à ce que la part de la Demanderesse fut dé-clarée être un quatorzième seulement dans la totalité des biens substitués, se réservant tout recours au sujet du partage des constitués et des moulins.

Aux exceptions péremptoires du Défendeur, J. L. de Bellefeuille, les Deman-deurs répondirent spécialement et firent une réplique générale. Leurs réponses alléguèrent :

Que le Défendeur est non recevable à se plaindre du partage de 1808; qu'il n'allègue aucun moyen de nullité à l'encontre du dit partage, lequel fut fait entre ses auteurs et ceux de la Demanderesse, reconnu, approuvé et ratifié par eux, par le Défendeur lui-même et par tous les grevés de substitution, les deux familles Dumont et de Bellefeuille, ayant toujours depuis cette époque joui de leurs parts respectives, conformément au partage. Que les renonciations allé-guées par le Défendeur ne peuvent en aucune manière militer contre les droits de la Demanderesse; que la non-ouverture de la partie de la substitution dévolue aux enfants de la Demanderesse ne peut empêcher la Demanderesse de deman-der la jouissance de la part des biens dont elle est aujourd'hui propriétaire ab-

solue. Enfin, que le Défendeur, J. L. de Bellefeuille, n'allègue à l'encontre du partage de 1808 aucun moyen suffisant pour en motiver la nullité ou la rescision ; car l'inégalité du partage des rentes constituées n'a été faite par les arbitres, et n'a dû être faite que pour équilibrer les parts et portions héréditaires, conformément aux dispositions du testament.

A ces réponses des Demandeurs, le Défendeur Joseph Lefebvre de Bellefeuille répliqua généralement.

A l'argument, *Laflamme*, pour les Demandeurs, appuya ses prétentions sur les motifs suivants :

Deux questions, dit-il, s'élèvent entre les parties :—1o. Les appelés à une substitution représentant différentes souches de grevés, doivent-ils uniquement partager entre eux les biens qui leurs sont parvenus du premier grevé qu'ils représentent, ou bien doivent-ils partager tous ensemble et par tête, la masse entière des biens substitués, sans égard à la portion originairement donnée à chaque grevé.

En d'autres mots, lorsqu'il y a plusieurs grevés, qui chacun transmettent à leurs descendants leur portion héréditaire dans les biens, doit-on faire abstraction de cette division et transmission pour partager entre les appelés par tête et non par souches ?

2o. L'appelé à la substitution, seul représentant d'un des premiers grevés, pour obtenir la distraction de sa part dans les biens substitués, doit-il attendre que la substitution soit définitivement ouverte pour les autres souches ?

En faveur de son opinion, *Laflamme* apporte d'abord les considérants du jugement de la Cour d'Appel dans l'affaire de *Globenski* et *Laviolette*, cité plus haut dans le résumé de la procédure. Puis il ajoute, qu'indépendamment de ce jugement, il ne peut y avoir de question quant au droit de la Demanderesse à la propriété de la moitié des biens dont elle demande le partage ; car les termes du testament et les principes en matière de substitution lui garantissent ce droit :

1o. *Les termes du testament.* Il établit ses deux enfants, son fils et sa fille, légataires universels, voulant qu'eux et leurs descendants jouissent chacun de leur portion héréditaire, donnant et léguant à ses arrière-petits-enfants, la pleine propriété, "*après le décès de leurs père et mère, AUXQUELS ainsi qu'à mes enfants surnommés leurs ayeuls et ayeules, je substitue les dits arrière-petits-enfants.*"

La substitution est faite des biens légués à ses enfants. Quels sont ces biens ou quelle proportion ? C'est deux tiers pour le fils et un tiers pour la fille. Ses enfants sont les premiers grevés, ou chargés de transmettre à leurs petits-enfants les biens qu'ils reçoivent, savoir, leurs parts et portions héréditaires. On ne peut assurément prétendre qu'ils soient chargés de rendre ce qu'ils n'ont jamais reçu. La transmission se fait aux termes du testament de leurs portions héréditaires en ligne directe ; et les arrière-petits-enfants sont substitués à leurs père et mère et à leurs ayeuls, pour leur portion héréditaire respectivement. Les arrière-petits-enfants ne peuvent évidemment réclamer que cette portion dont leurs père et mère jouissaient, car c'est là ce que les grevés étaient tenus de

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leur rendre, et qui pour eux et leur descendants constituait exclusivement la substitution.

Les substitués recueillent les biens par les mains et par le canal de la personne à laquelle ils sont substitués. Or, prenant les biens qu'ils ont à recueillir, les petits enfants n'ont que ceux qu'ils ont reçus par le canal du premier grevé, et ainsi de degré en degré jusqu'à l'ouverture de la substitution. Si on considère la personne à laquelle ils sont substitués, on arrive encore au même résultat ; ils sont substitués d'abord à leur père, qui lui, était substitué au sien.

Il est impossible de faire remonter cette transmission en dehors des règles ordinaires de succession pour établir, sans termes exprès, une substitution d'une ligne à une autre, car c'est là la prétention des Défendeurs, qui ne peut être justifiée par aucune disposition du testament, ou par aucune autorité.

20. *Les principes de droit en matière de substitution.* La principale règle sur l'interprétation des substitutions est, qu'on doit rechercher ce qu'a voulu l'auteur de la substitution, sans s'attacher aux termes.

Le testateur, lorsqu'il ne déclare pas le contraire, est censé avoir modelé sa disposition sur celle de la loi.

Les prétentions des Défendeurs vont à établir dans la succession un fidéi-commis réciproque ; or, il suffit pour ne point admettre de fidéi-commis réciproque, que la disposition du testament puisse s'entendre et s'exécuter d'une autre manière.

Ce qui est jugé sur des actions actives et passives, avant l'ouverture de la substitution, avec le grevé, doit tenir après l'ouverture de la substitution ; et lorsque la chose a passé en force de chose jugée, le substitué ne peut pas revenir contre, pourvu néanmoins que le grevé se soit défendu, et que l'arrêt ou jugement ait été rendu sur les conclusions des gens du roi. (Pothier, *Substit.*, sec. 5, art. I).

Lafamme rapporte ces paroles de Merlin (Rep. t. XVI, p. 606, §12) :

"La substitution linéale est ainsi appelée, parce qu'elle est affectée à la ligne dans laquelle elle se trouve ; et elle a ordinairement cette qualité, lorsqu'elle est tout à la fois graduelle et faite soit au profit de la famille, soit en faveur des descendants successivement et les uns après les autres. Dans ce cas en effet, il est de maxime constante, que la substitution une fois entrée dans une ligne, n'en sort plus qu'après l'épuisement de tous les individus qui s'y trouvent habiles à la recueillir."*

Loranger, à l'argument, pose la question comme suit :

L'on demande si, lors de l'ouverture de la substitution, les arrière-petits-enfants issus des premiers grevés de substitution et qui forment leur descendance par plusieurs familles différentes, partageront par souches ou par têtes ?

* Autorités des Demandeurs.

Pothier, *Substitutions*, sec. 3, art. I.—Bourjon, *Substitutions*, tit. V, sec. 3, §22.—Ricard, *Substit.* part. I, c. 8, Nos. 582, 692.—Bouguier, lettre F, No. 30.—Le Maître, tit. 15, p. 461.—Thévenot D'Essaulle, p. 323, No. 987.—Id., pp. 325, 333.—Id., sec. 8, c. 63, Nos. 983, 987, 988.—Ricard, *Substit.*, c. 8, Nos. 551, 552.—Id., c. 8, No. 676.—Cujas, tit. 40.—Dig. Sal. ad dict. leg. 23, t. I, p. 2149.—Ordon. des *Substit.*, tit. I, art. 22.—Roland de Villargues, *Substit. prohibées*, pp. 2, 3, et 59.—Merlin, *Répertoire*, Vo. *Substit. fidéi-com.*, t. XVI, pp. 596, 606.—Peregrin, *De fidéi-com.*, art. 20, No. 3.—Pothier, *Substitutions*, sec. 5, art. I, § V, p. 100.—Id., sec. 6, art. I.—Id., sec. 7, art. IV.

En réponse, *Loranger* dit :

La solution de cette question dans le sens du partage par tête, dépend des propositions suivantes :

1o. De droit commun le partage d'un legs en faveur de légataires appelés par une disposition commune se fait par têtes.

2o. La représentation fait exception à cette règle, c'est-à-dire que dans le cas où le prédécès d'un des légataires aurait par représentation appelé ou rapproché son héritier dans son degré, le partage se fait par souches, et c'est l'exception qu'il s'agit d'examiner ici.

3o. Dans le cas actuel, le prédécès d'un des arrière-petits-enfants, n'admettrait pas par représentation ses enfants au partage avec les autres petits enfants appelés, ses oncles et tantes, lors de l'ouverture de la substitution.

4o. En thèse générale, la représentation n'avait lieu que dans les successions *ab intestat* ; elle était inconnue dans les successions testamentaires, dont les règles différaient totalement de celles qui réglaient les successions légitimes.

5o. La maxime que la représentation avait lieu en matière de substitution n'était consacrée par aucune loi et n'était pas admise dans la Jurisprudence. Elle ne devait sa faveur qu'à l'opinion isolée de quelques auteurs, combattus par la masse des Jurisconsultes, et sous ce rapport l'art. 21 de l'Ordonnance de 1747 n'a pas établi un droit nouveau en abolissant la représentation.

6o. Ce système de représentation en matière de substitution était même contraire au principe de la transmission, qui fait que le substitué recueille directement de la main du défunt et non de celle du grevé, qui ne favorise en rien l'appelé.

7o. Elle était admise seulement dans les cas où le testateur s'en était expressément expliqué, et dans ceux où de son silence l'on inférait qu'il avait voulu prendre pour modèle de l'ordre de la succession, l'ordre établi par la loi, c'est-à-dire la loi des successions *ab intestat*.

8o. Ici le silence du testateur ne pourrait faire naître cette présomption, car dans nos successions il n'est en aucune façon suppléé aux paroles dans lesquelles le testateur dispose de ses biens, et ce en vertu du statut de 1801, qui a établi la liberté illimitée de tester, et substitué aux maximes de la coutume les principes du droit écrit en matière de succession.

9o. Cependant admettant, que la question doive être jugée comme elle l'eût été en France avant l'Ordonnance de 1747, le cas actuel ne rentrerait pas dans la thèse des partisans de la représentation, dans la catégorie de ceux où ils admettraient cette représentation.

10o. Ils ne l'admettraient que dans le cas où la substitution étant faite en terme collectif, soit de la famille des représentants ou descendants du testateur ou des grevés, et ici les arrière-petits-enfants sont appelés nominativement.

11o. L'intention du testateur d'exclure la représentation doit s'inférer si on juge sa disposition par inférence, parcequ'il a expressément appelé ses arrière-petits-enfants sans comprendre leurs héritiers ou descendants dans la vocation. (2).

(2) Autorités des Défendeurs Elmiro Dumont et Godefroi Laviolette, citées par M. Loranger.

Lebrun, *Successions*, l. III, ch. 5, sect. I. pp. 456, 468.—Code Civil, art. 787.—Pothier,

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M. Joseph Lefebvre de Bellefeuille *es-qualité*, comme nous l'avons déjà dit, plaide séparément, et appuya ses moyens de défense, lors de l'audition de la cause, sur des principes de droit quelque peu différents de ceux de ses co-défendeurs. Représentant en sa qualité de tuteur élu à la substitution, tous les appelés à cette substitution, il dut comprendre dans sa défense non seulement les intérêts de ses enfants, mais encore ceux des autres branches de la famille, également concernés.

De Bellefeuille, lors de l'argument, dit :

Si avant d'entrer dans l'examen de la question légale, l'on se demande au seul point de vue de l'équité, si un d'entre quatorze arrière-petits-enfants, appelés tous et de la même manière, ensemble, en vertu d'une seule et même disposition, peut avoir pour sa part un tiers au lieu d'un quatorzième, il semble que la réponse ne saurait être douteuse, tant une semblable prétention répugne à la lettre du testament, et tant pour obtenir ce résultat il faut s'écarter des indications que la disposition elle-même contient de la volonté du Testateur.

Quant à la question de loi, le principe qu'invoque la Demanderesse, et c'est le seul qu'elle invoque ou puisse invoquer, est, qu'en matière de fidéi-commis la représentation a lieu comme en matière de succession ; et l'application qu'en fait la Demanderesse est, qu'elle a droit à la part à laquelle avait droit son père. Mais si la Demanderesse a raison d'invoquer le principe de la représentation, son père pouvait l'invoquer également. Représentant Nicholas Eustache Lambert Dumont, le fils aîné du Testateur, le père de la Demanderesse avait droit comme aîné à trois-sixièmes des biens du Testateur et Madame Laviolette à un quart.

Pourquoi alors représentant son père, la Demanderesse par sa présente action ne demande-t-elle pas trois sixièmes au lieu d'un tiers ? C'est qu'elle l'a déjà demandé sans succès par une action qu'elle a perdue. *Globensky & Laviolette*. (4. L. C. Rép. p. 384.)

La Cour Supérieure et la Cour d'Appel à l'unanimité, incluant le Juge en Chef Sir James Stuart, quoiqu'il soit mort avant d'avoir pu prononcer son jugement, ont décidé qu'il s'agissait non d'une succession ab intestat, mais d'une succession testamentaire ; qu'il n'y avait aucune volonté exprimée dans le testament, de donner à la Demanderesse un droit d'afnesse, et qu'on ne pouvait, en ayant recours aux conjectures admises par certains auteurs, induire cette volonté.—Et la Demanderesse a acquiescé à ce jugement. Or il ne s'agit que de

Substitutions, t. VIII, p. 481.—Toullier, t. IV, p. 182 et suiv.—Ricard, *Représentation*, ch. I, No. 4 et suiv.—Id., *Substitutions*, Traité III, ch. 8, Sect. 2, Nos. 581, 582.—Eusèbe de Laurière sur l'art. 321.

De la Représentation, p. 167, no. 200.—Merlin, *Répertoire*, t. II, p. 192.—Cout. de Paris, art. 319, 320, 337.—Merlin, *Répertoire*, t. II, p. 208.—Bourjon, *Substitutions*, t. II, tit. 5.—Furgole, *Commentaire sur l'Ordonnance des Substitutions*, tit. I, art. 22, p. 80.—Parfait Notaire, t. II, ch. 9, p. 255.—Bourjon, tit. V, Sect. III, No. 12, t. II, p. 175.—Ricard, *Substitutions*, ch. 9, no. 692, p. 391.—Lebrun, *Successions*, l. III, ch. 5, Sect. I, no. 6, p. 457.—Bouguier, sur la lettre F., no. 3.

référer aux auteurs suivants (1) pour se convaincre que la question décidée par les deux cours est précisément la même que celle soulevée par la Demanderesse en la présente cause. S'il y a une différence, c'est même en faveur du droit d'aînesse que favorise l'esprit du Droit Français, dans la matière des réserves coutumières et de la légitime. Quelle anomalie si la Demanderesse, après avoir acquiescée à un jugement qui déclare que le partage ne doit pas se faire par souches, réussissait dans sa présente demande!

Le fait seul qu'elle a droit non seulement à un tiers mais à une moitié en vertu du principe qu'elle invoque, et qu'elle se contente de demander un tiers, devrait suffire pour faire rejeter sa demande. N'aurait-elle pas appelé à sa Majesté en Son Conseil Privé, si elle eut cru le jugement erronné? Ne l'ayant pas fait, comment peut-elle sous prétexte qu'elle demande une partie au lieu du tout, remettre en question devant les tribunaux ce que nos tribunaux ont décidé? Le principe en vertu duquel le tout a été refusé étant précisément celui en vertu duquel une partie est aujourd'hui demandée.

Le principe que la Demanderesse invoque, à savoir, que la représentation a lieu en matière de fidéi-commis est sans contredit faux : formulé d'une manière aussi générale, il est impossible à la Demanderesse de l'appuyer d'une seule autorité respectable. Dans les legs il s'agit d'une prédilection du Testateur ; si la personne qu'il a choisie ne recueille pas, le legs devient caduc ou passe aux autres légataires nommément appelés par le Testateur. C'est le principe fondamental du Droit Romain sur les dispositions testamentaires.

Si, dans les successions, la représentation a été admise, c'est contrairement à la rigueur du droit, en admettant la présomption que, si celui de la succession duquel il s'agit avait eu occasion de faire un testament, il l'aurait ainsi prescrit. — Mais aux volontés du Testateur telles qu'exprimées dans l'acte même, il n'est pas possible d'ajouter sans substituer à la volonté du Testateur une volonté étrangère. (2) S'il y a eu difficulté ce n'est pas sur ce point, mais sur un autre

(1) Les auteurs qui admettent un droit d'aînesse dans une succession testamentaire, lequel droit d'aînesse n'est pas spécialement légué, sont les mêmes que ceux qui admettent la représentation dans les fidéi-commis. — Ricard, Substitutions, p. 378, No. 575. — Id., p. 380, Nos. 581, 592. — Guyot, Traité des Fiefs, t. V, 323, et 352. — Ricard, Substitutions, p. 404, No. 692. — Pothier, Substitutions, Sect. III, art. II p. I. — Bourjon, Droit Commun, Subst. t. II, p. 175, no. 22. — Guyot, Répertoire, Vo. Substitution, t. XVI, p. 508. — Bouquier, Arrêts, Lettre F, no. III, p. 143. — Arrêts de Lamoignon, t. I, tit. 48, art. 28, 29, 30, pp. 307, 308. — Merlin, Répertoire, Vo. Subst.-fidéic. Sect. X, p. X, t. 12, p. 377. —

(2) La Représentation n'est pas admise dans les fidéi-commis. — Leg. 32 § 6 § de legat. et fideicom. 20. — Leg. 69 § 3 § ff de legat. et fideicom. 20. — Cujas, Consult. 15. — Henrys, Œuvres, t. III, p. 109, Quest. 25e, no. 3. — Henrys, Œuvres, t. III, p. 112, Observations. — Faber, de err. pragmat. decad. 55. err. 3, dit qu'il n'y a que des praticiens ignorants qui soient dans ce sentiment, sic putant plerique ex pragmaticis nostris, sed imperitioribus. — Faber, Codex, p. 668, Def. X. — Questions sur les Substitutions. Opinions des Parlements sur la Quest. 22e. Tous ces parlements sans une seule exception ont répondu à la Quest. 28e négativement. La réponse du Parlement de Flandre seule souffre difficulté ; mais la réponse à la Quest. 29e lève tout doute. — Merlin, Répertoire, Vo. Représentation, Sect. VI, § II. — Papon, Arrêts, I. XX, tit. 3, art. 33. — D'Olive, Arrêts, liv. V, ch. 23, p. 739. — Maynard, Arrêts, liv. V, ch. 45, cité par Henrys, loco citato. — Bardet,

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qui s'était élevé, alors que régnait en France sur la matière des Substitutions, la confusion presque inextricable à laquelle l'Ordonnance de 1747 seule pût mettre fin. Cette question bien différente de celle que pose la Demanderesse, était de savoir, si lorsqu'au lieu d'être fait en faveur de personnes certaines et désignées par leurs noms, le fidéi-commis était fait en faveur de plusieurs désignées par un nom collectif, comme enfants, parenté, famille ou autre nom semblable, il devait y avoir lieu à la représentation entre les personnes ainsi appelées ; dans les mêmes cas où elle aurait lieu s'il succédaient *ab intestat*.

Sur ce point l'art. 21 de l'Ordonnance des Substitutions, est à l'effet suivant :
"La représentation n'aura point lieu dans les Substitutions, soit en directe ou collatérale, et soit que ceux en faveur de qui la Substitution aura été faite y aient été désignés en particulier, et nommés suivant l'ordre de la parenté qu'ils avaient avec l'auteur de la Substitution, le tout à moins qu'il n'ait ordonné par une disposition expresse, que la représentation y aurait lieu, ou que la Substitution serait déferé suivant l'ordre des successions légitimes."

Il existe deux raisons qui empêchent la Demanderesse de soulever dans la cause actuelle aucune semblable question. Les termes dont s'est servi M. Dumont s'y opposent formellement, et ils y prêteraient que la question devrait être décidée conformément à la disposition de l'Ordonnance qui a toujours été la loi en pareil cas.

Les autorités ci-dessous citées établissent clairement que l'Ordonnance n'a pas introduit un droit nouveau. (3)

La Cour trouvera dans les auteurs cités que sur les douze Parlements auxquels le Chancelier d'Aguesseau posa la question, plusieurs, entr'autres Dijon, Grenoble, Toulouse, Pau, déclarèrent de la manière la plus énergique qu'ils n'avaient jamais sous aucune forme, admis la représentation dans les fidéi-commis, citant l'opinion du président Fabre qui traitait d'ignorants tous ceux qui prétendaient qu'elle put être admise. *Quis enim nescit jus representationis habere tantum locum in successione ab intestato non in substitutionibus.* Cujas, Consult. 15.

D'autres reconnurent qu'ils admettaient la représentation dans les fidéi-commis ; mais que leur jurisprudence était contraire à la loi et devait être abolie ; par exemple, le premier président du Parlement d'Aix. (Quest. sur les Subst. Quest. 20e, p. 305).

Recueil d'arrêts, t. I, l. I. ch. 78, arrêt du 6 Mars 1620.—Boniface, t. II, l. 2, tit. 2, ch. 7, cité par Henrys, *loco citato*.—Brodeau sur Louet, Lett. F, ch. 2.

(3) L'ordonnance de 1747, en prohibant la représentation dans les fidéi-commis, n'a pas introduit un droit nouveau.—Chabot, Questions Transitoires, t. II, p. 251, Vo. *Substitution*.—Questions sur les Substitutions. Réponse des Parlements à la quest. 29e.—Papon, Arrêts notables des Cours Souveraines, l. XX, tit. 3, art. 33.—Maynard, Arrêts, liv. V, ch. 45, cité par Henrys, *loco citato*.—D'Olive, Arrêts du Parlement de Toulouse, liv. V, ch. 23, p. 739.—Boniface, t. II, l. 2, l. tit. 2, ch. 7.—Brodeau sur Louet, lettre F, ch. 2.—Cochin, Œuvres, t. IV, p. 268, cause 76e.—Aymart, Explication de l'Ordon., p. 60 et 61.—Expilly, Arrêts, ch. V. Cujas, Consult. 15.—Henrys, Œuvres, t. III, p. 109. Quest. 25e, no. 3.—Id., p. 112. Observations.—Faber, de err. pragmat. decad. 55. err. 3.—Faber, Codex, p. 688, Lef. X.

Substitutions, la
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29e.—Papon,
Arrêts, liv. V,
use, liv. V, ch.
tre F, ch. 2.—
p. 60 et 61.—
Quest. 25e,
rr. 3.—Faber,

Quant au Parlement de Paris nous avons le témoignage de Ricard dans sa Préface, qu'il avait conservé, plus scrupuleusement que tous les autres Parlements, le véritable esprit du Droit Romain, d'où l'on peut induire qu'il n'admettait pas la représentation dans les fidéi-commis.—Et c'est en outre ce qui résulte des observations du Chancelier d'Aguesseau sur les questions 28e et 29e.

C'est dans Henrys que les textes du Droit Romain sont cités avec le plus de soin ; et dans cet auteur et dans Bretonnier son annotateur, se trouvent toutes les principales autorités qui établissent que la représentation ne peut sous aucun prétexte, être introduite dans les fidéi-commis.

Sur cette question, comme sur tant d'autres ayant rapport aux Substitutions, les différents Jurisconsultes en France avant l'Ordonnance adoptaient l'affirmative ou la négative, suivant le préjugé que chacun pouvait avoir ou de la faveur des substitutions ou des inconvénients qu'elles peuvent produire.

L'opinion de Pothier à l'endroit déjà cité est que, tout au plus, les raisons données par Ricard sont spécieuses, et le Chancelier d'Aguesseau (Quest. sur les Subst. pp. 304 et 305) montre que la difficulté de distinguer exactement les expressions collectives de nature à faire naître la présomption, que le substituant a voulu se conformer à la loi des successions *ab intestat*, sont tellement grandes qu'il vaut mieux exclure la représentation dans tous les cas, et exiger du Testateur qu'il exprime sa volonté d'une manière formelle, s'il entend se conformer à la loi des successions.

Quand on considère que c'est sous ces circonstances que l'art. 21 de l'Ordonnance des Substitutions a été passé, il semble qu'il soit impossible de prétendre que l'Ordonnance des Substitutions ait introduit un Droit nouveau, et que la seule opinion correcte est, que l'Ordonnance n'a fait que proclamer d'une manière plus décisive ce qu'avaient toujours voulu la loi et la raison.

Quelques auteurs qui ont écrit subséquemment à l'Ordonnance, comme Thevenot d'Essaule, Furgole, contiennent, il est vrai, des passages de nature à induire en erreur sur ce point, ceux qui n'examineraient pas attentivement l'état de la question antérieurement à l'Ordonnance ; mais ces auteurs s'expriment incidemment sans se piquer d'être bien exacts, et sans songer à l'usage qu'on ferait, dans des pays auxquels l'Ordonnance ne devait pas s'étendre, d'une expression trop générale. Ne pensant qu'à dénoncer les désordres que l'Ordonnance avait eu pour but de faire cesser, ils étaient naturellement exposés à exagérer la gravité ou l'universalité de ces désordres. (Furgole, Com. sur les Subst. pp. 91 et 108.)

Et Thevenot d'Essaule, chap. 12, s'exprime d'une manière non moins générale lorsqu'il montre comment, avec des conjectures, on avait admis la représentation dans tous les fidéi-commis et donné à la condition, l'effet de la disposition. "C'était, ajoute-t-il, porter la licence des conjectures plus loin que le Droit Romain, où les enfants mis dans la condition n'étaient pas censés appelés et où la représentation était inconnue dans les fidéi-commis."

Il semble que ce n'est pas au moyen de semblables passages que la Demanderesse pourrait réussir à établir que la jurisprudence en France antérieurement à l'Ordonnance, dans aucun Parlement donné, et notamment dans le Parlement de Paris, était favorable à ses prétentions.

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Et supposant même qu'on pourrait citer quelqu'arrêt isolé pour établir que le Parlement de Paris avait adopté le sentiment de Ricard, cependant nos Cours ayant la preuve devant elles que ce sentiment est erronné et contraire au Droit Romain, ne seraient nullement tenues de s'y conformer.

En second lieu, les termes dont s'est servi M. Dumont ne permettent pas à la Demanderesse de soulever la question.

Si M. Dumont eût appelé sa famille à la substitution et étendu la disposition à tous les degrés permis par la loi;—ou s'il eût appelé ses descendants en nom collectif et déclaré que la substitution serait graduelle; ou encore, s'il eût appelé ses enfants à charge de substitution en faveur de leurs descendants aussi loin que la substitution pourrait s'étendre, la question se serait présentée. Mais dans le cas actuel, il y a vocation spéciale des enfants, vocation spéciale des petits enfants, et vocation spéciale des arrière-petits-enfants. Pour prendre, les petits enfants, dans le cas actuel, n'avaient pas besoin du secours de la représentation, et les arrière-petits-enfants n'en ont pas besoin non plus.

Les arrière-petits-enfants viennent à la substitution, non parce qu'ils sont compris sous le terme collectif d'enfants ou de petits enfants; mais parce qu'ils sont appelés nommément en leur qualité d'arrière-petits-enfants.

Le droit de représentation qu'invoque la Demanderesse est un droit qu'il n'est pas possible de concevoir, car ce n'est pas la part de son père à laquelle elle a droit, mais la part que le Testament lui donne à elle-même; et elle a droit à sa part en toute propriété à l'ouverture de la substitution en faveur des arrière-petits-enfants, pendant que son père n'avait droit à la sienne qu'à charge de substitution.

En outre si l'on cherche à appliquer le raisonnement de Ricard, quant à une volonté du Testateur d'introduire la représentation, on se trouve arrêté par des difficultés insurmontables.

L'appel *capit a gravante non a gravato*. (4)

Tous les arrière-petits-enfants tiennent donc du Testateur : or plusieurs légataires appelés conjointement partagent également. *Si partes non sunt adjectæ æquæ servantur*. (5)

La Demanderesse ici prend de son chef, comme légataire appelée en sa qualité d'arrière-petite-enfant; prenant de son chef, il est de règle qu'elle prenne par tête. (6) Le partage par souches n'étant possible que là où il y a représentation, l'effet de la représentation étant de donner à toute une souche la part que celui, que cette souche représente, aurait eue.

(4) *Capit a gravante non a gravato*.—Cochin, Œuvres, t. VII, p. 396, cause 1386.—D'Aguesseau, Plaid. 46; pp. 237, 238, 239.—Denisart (ancien) t. IV, pp. 578, 583.—Ferrière, Dictionnaire, t. II, p. 682.—D'Essaule, Substitutions, p. 207.—Ricard, Donat. Test. t. II, p. 243.—Henrys, Œuvres, t. I, p. 751, No. 3.—Ricard, Substitutions, p. 268, 270, No. 100, 104.—Dumoulin.—Papinien, sur la loi *unum ex familia ff. de legatis*.—Elrière, Arrêts de Provence, p. 473.—De La Combe, Recueil de Jurisprudence, p. 651, vo. *substitution*, Part. II, Sect.—IV, Dist. I, No. 7.—Merlin, Répertoire, t. XII, p. 376, vo. *substitution fideic.* Sect. X, p. X.

(5) *Si partes adjectæ non sunt æquæ servantur*.—Droit Romain : "*Ætis enim constat, nullis partibus nominatis exæquis partibus eos hoeredes esse*."—Ricard, Donat. t. I, p. 431, No. 162.—De La Combe, Recueil de Jurisp. p. 652, 720.—Despeisses, Œuvres, t.

La Demanderesse a renoncée à la succession de son père, et ce dernier avait renoncé à la succession du fils du Testateur. Sous ces circonstances la représentation est impossible. On ne vient jamais par représentation de ceux qui ont renoncé. (7)

Si, au lieu d'une succession testamentaire, il s'agissait d'une succession légitime, tous les arrière-petits-enfants venant de leur chef, le partage se ferait par têtes. (8)

On a pu voir par ce rapport que les questions de droit suivantes ont été soulevées dans la discussion de la cause.

1o. La représentation est-elle admise dans les fidéi-commis ?

2o. L'ordonnance de 1747 a-t-elle introduit un droit nouveau en abolissant la représentation dans les fidéi-commis ?

3o. Peut-on représenter ceux qui ont renoncé ?

La Cour n'a pas décidé ces questions ; elle s'est contenté de déclarer la Demanderesse propriétaire de la partie des biens qu'elle réclamait, et cela *en vertu du testament*. Voici le texte du jugement.

" La Cour, faisant droit sur les conclusions de la Demanderesse, Virginie Dumont prises en la dite déclaration, déclare la dite Demanderesse, Dame Virginie Dumont, être en son nom et droit propriétaire en pleine propriété en vertu du Testament du dit Louis Eustache Lambert Dumont, de la substitution y contenue et du partage susdit d'une moitié indivise dans les susdits biens ci-haut désignés.

" Et ordonne et adjuge que sous un mois de délai de la date de la signification du présent Jugement, les Défendeurs équalité soient tenus de convenir d'experts

II, p. 169, No. 27.—Pothier, Donat. Test. ch. 6, Sect. 5, art. 2.—Bourjon, Droit Commun, t. II, p. 177, No. 31, en note.—Furgole, Traité des Testaments, t. III, pp. 63, 79, No. 133.—De La Combe, Recueil de Jurisprudence, p. 391, Vo. *legs*, Part: II, Sect. 7.

(6) Légataires appelés de leur chef partagent par tête.—Loisel, Institutes coutumières, t. I, p. 384.—Faber, Codex, De Fideicom. p. 667, Def. XI.—Arrêtés de Lamignon, t. I, tit. 48, art. 12, p. 305.—Basnage, sur l'art. 305 de la Cout. de Normandie, t. I, p. 478.—Ferrière, Dictionnaire, t. II, p. 687. *Vbo. succéder par têtes*.—Furgole, Traité des Testaments, t. III, p. 19, no. 133.—Code Napoléon, art. 745.—De La Combe, Recueil de Jurisp. p. 4. *Vo. accroissement*, no. 6.

(7) Denisart (ancien) IV, p. 262, art. 21, 22, 23.—Id., p. 234, 235, art. 15.—Ferrière, Dictionnaire, t. II, p. 519.—Bourjon, Droit Commun, t. I, p. 818, art. 9 et suiv.—Pothier, Success. ch. II, Sect. I, art. III.—Coutume d'Orléans, art. 359.—Coutume de Paris, art. 310.—Despeisses, Œuvres, t. II, p. 452.—Guyot, Répertoire, t. XV, p. 293. "*On ne peut succéder par représentation d'une personne qui en eut été incapable si elle eut survécu.*"—Roblès, tit. I. ch. II, No. 18, cité par Guyot, *loco citato*.—Auzanet, Œuvres p. 291, art. 319.—Duparc, Arrêtés du Parlement de Bretagne, t. IV, p. 732.—Basnage, Œuvres, t. I, p. 471, arrêt du 23 Juillet 1654.—Code Napoléon, art. 785.—Demolombe, Cours de Code Napoléon, t. XV, p. 25, art. 24 et suiv.—Berriat Saint Prix, Notes sur le Code Civil, t. II, p. 63, art. 2762.—Nouvelle 118 : *Tantum ex hereditate percipiant* (c. a. d. ceux qui représentent) *portionem quantum eorum parens futurus erat accipere, si superstes fuisset.*" Or le représenté qui renonce est considéré comme s'il n'avait jamais existé.

(8) Guiné, Traité de la Représentation, p. 169.—Pothier, Succ. ch. II, Sect. I II, p. I, citant Coujas : "*Jus representationis hanc vim tantam habet ut remotior cum propiore concurrat non ut propiore prorsus excludat.*"—Basnage sur l'art. 304 de la Cout. de Normandie.—Demolombe, t. XIII, p. 629.—Pothier, Sec. ch. II, Sect. I, art. I, p. 3, sur la question, les enfants d'un fils prédécédé excluent-ils les enfants d'un autre fils vivant lequel est exhéredé ?

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avec la Demanderesse pour faire ou établir le lot ou la part et portion pour moitié qui appartiendra définitivement à la dite Demanderesse d'une part, et aux dits défendeurs, tant en leurs propres noms qu'en leurs dites qualités de l'autre dans les dits biens, sinon que les dits experts soient nommés d'office par cette Cour ou l'un des juges d'icelle, et que dans le cas où par le dit rapport d'Experts il serait constaté que les dits biens ne peuvent commodément être partagés suivant les dits droits de la dite Demanderesse et des dits Défendeurs tant en leurs propres noms qu'en leurs dites qualités qu'ils soient en ce cas vendus par licitation en la manière ordinaire et prescrite par la loi au plus offrant et dernier enchérisseur, pour être le prix de la dite vente payé et distribué à la dite Demanderesse et aux Défendeurs par moitié, le tout avec dépens contre les dits Défendeurs, c'est-à-dire, contre la Défenderesse Lavolette, Dame Elmire Dumont en son propre nom et contre les deux Défendeurs Lavolette et De Bellefeuille à-qualité qu'ils ont été poursuivis." Jugement pour Demandeurs.

R. & G. Laflamme, pour Demandeurs.

Hon. Loranger, C. R., pour Défenderesse Elmire Dumont.

Jos. Loranger, pour Défendeur Godefroi Lavolette, à-qualité.

Ryan & DeBellefeuille, pour Défendeur J. L. de Bellefeuille, esqualité.

Edm. Barnard, Conseil.

(E. LEF. DE B.)

MONTREAL, 6th February, 1862.

ENQUÊTE SITTINGS.

Coram MONK, J.

No 2284.

Fenn vs. Bowker.

FAITS ET ARTICLES—ANSWERS *Viva voce*.

HEED:—That a party in the cause who has been ordered to answer interrogatories *sur faits et articles viva voce*, under 20 Vic. C. 44 S. 86, may read his answers from a paper previously prepared.

In this case, the defendant appeared at the *Enquête* sittings to answer *viva voce* to interrogatories previously served upon him in the terms of 20 Vic. C. 44 S. 86, and in answering, he made use of a paper on which he had previously written his answers.

Snowdon, for Plaintiff, objected to the Defendant's making use of the paper in giving his answers as opposed to the terms of the statute and the invariable practice of the Court—referring to the decision in *Moss vs. Douglas*, No. 1053, S. C. 4th May, 1859.

Robertson, for Defendant, contended that there was no positive enactment prohibiting the use of written memoranda; which view the Court adopted, overruling the objection.

Snowdon & Gairdner, for Plaintiff.

A. & W. Robertson, for Defendant.

(H. L. S.)

Note. *Vide Contre*—Coleman et al. vs. Fairbairn. L. C. Jurist, Vol. 4 p. 127.

SUPERIOR COURT.

MONTREAL, 1st December, 1862.

Coram MONK, J.

No. 997.

Ex parte Bernard Devlin.

Applicant for writ of Certiorari.

Held:—That the council of the Bar acting and taking cognisance of complaints against members of the profession under the 72nd Chapter of the consolidated Statutes of Lower Canada have no jurisdiction to try a complaint made against a member for an act done as a mere agent.

H. W. Austin, Esquire, complained of *B. Devlin*, Esquire, before the council of the Bar at Montreal, on the 20th May, 1862, that after revocation of the power of attorney which *Mr. Devlin* held from a firm of Farren, Fullam, & Co., in New York, had been informally notified to *Mr. Devlin*, by *Mr. Austin* which informal course *Mr. Austin* had adopted from a sense of delicacy, *Mr. Devlin* had nevertheless after receiving the notification, drawn as such attorney from the Prothonotary of the Superior Court the sum of £13 which was payable by the Prothonotary to the said Farren, Fullam and Co., as a dividend out of the estate of one Mullins.

Mr. Devlin pleaded to the complaint, and after evidence heard before the Council, the following judgment was rendered by the Council, Montreal, June 16th, 1862.

Coram S. Bethune, F. W. Torrance, P. R. Lafrenaye, F. P. Pominville J. Doutre, A. Robertson, M. Marchand, Esquires, members of the said Council.

The council, having heard the parties upon the present complaint, and having deliberated, pronounced the following judgment.

That in view of the fact that *Mr. Devlin* had been made aware by *Mr. Austin* before drawing the money from the Prothonotary, that his power had been revoked, he ought not under the circumstances to have applied for and drawn the same; and that in acting as he did, and in refusing subsequently to account for or explain his conduct when called upon so to do by *Mr. Austin*, he has acted in a manner unbecoming the honor and dignity of the profession.

The jurisdiction assumed by the council of the Bar in this case was based upon the 72nd Chapter of the Consolidated Statutes of Lower Canada, Sec. 10.

The council of each section shall, in and with regard to such section, have power; First, for the maintenance of the discipline and honor of the body, and as the importance of the case requires, to pronounce through the *Bâtonnier* a censure or reprimand against any member guilty of any breach of discipline or of any action derogatory to the honor of the Bar, &c.

On the 18th November last, *Mr. Devlin* gave notice to the members composing the Council, who had concurred in the above judgment, that he would apply to the Court for a writ of *Certiorari* founded upon affidavit to remove the proceedings into the Superior Court.

On the day of application, the applicant objected to the proceedings and judgment of the Council for a variety of reasons, and so far as the present report

Paquette
vs.
Limoges.

requires : because the judgment was headed a complaint by H. W. Austin, whereas it should have been a complaint by the Syndic, F. W. Torrance, and because the judgment of censure should have been pronounced through the *Bâtonnier* and not through the Council, and because the Council was without jurisdiction in the present case.

Per Curiam. The Court is satisfied that in the matter complained of, the applicant acted as a simple agent of Farren, Fullam & Co. in New York, and not in his professional capacity as a member of this bar. The Council in this matter were clearly without jurisdiction and the writ may therefore issue.

Motion granted.

Kerr and Nagle, for petitioner.

A. Morris, for Council.

COUR DE CIRCUIT.

MONTREAL, 31 Octobre, 1862.

Coram SMITH, J.

No. 3510.

Paquette vs. Limoges & vir.

Jugé :—Qu'un mari et une femme séparés de biens sont conjointement et solidairement tenus au paiement de choses nécessaires à la vie, bien qu'elles aient été achetées pendant la communauté.

Le Demandeur poursuivait les Défendeurs Dame Marie Louise Limoges et Antoine Marsant dit Lapierre, séparés de biens par sentence judiciaire, pour la somme de £12 7s. 6d. étant pour épicerie, aliments et autres choses nécessaires à la vie, fournis aux défendeurs et à leur famille.

Le mari confessa jugement ; mais la femme plaida qu'elle était judiciairement séparée de biens ; et que la dette avait été contractée et les effets et marchandises vendus et livrés pendant la communauté, à laquelle elle avait renoncé.

À l'enquête, les parties prouvèrent leurs prétentions respectives.—

Mr. Girouard pour le Demandeur, prétendit que la Défenderesse ne pouvait invoquer le bénéfice de son jugement en séparation de biens dans cette espèce ; que ce n'était pas comme dette de la communauté, mais comme charge du mariage, que le Demandeur réclamait des deux parties assujetties à ces charges le paiement des effets et des marchandises, qu'il leur avait avancées, pour les soutenir eux et leur famille, que d'après les lois du mariage, le mari et la femme sont tous deux tenus de se faire vivre et de faire vivre leur famille, et qu'en cela il importait peu que la femme fut séparée de biens ou non ; et à l'appui de ces propositions, il cita les autorités suivantes : *Pothier, traité du Contrat de Mariage*, N. N. 384, 385, 386, 387 et 388 ; *Pothier, de la communauté*, §IV. *De la Séparation Contractuelle* N. N. 464, 465 ; §III, *de la séparation de biens judiciaire*, N. N. 522, 732 ; *Bourjon, Droit Commun de la France*, sur les art. 234, 235, 236, page 586, §XIV ; *Duplessis, de la Communauté*, page 391 ; *Renusson, de la Communauté*, page 166, *Ed. 4e. arrêt du 12 avril 1595, rapporté par Brodeau sur Louët, let. R, somm. 54, et un autre arrêt rapporté par Soëfos, tome 1er. cent. 1dre. c. 60 ; Rivet vs. Léonard et vir. 1 Juriste 172 ; Cholet vs. Duplessis, voir No. 1211, Cour Supérieure, Montréal, 6 Juriste, p. 81.*

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; Cholet vs. Du-

p. 81.

Mr. Onésime Lorranger, pour la Défenderesse, soutenait au contraire que la dette ayant été contractée pendant la communauté, à laquelle elle avait renoncé, elle était de plein droit libérée de la payer, de même qu'elle était déchargée de toutes les autres dettes de la communauté; qu'en cela, la loi ne fait aucune distinction entre les dettes pour le soutien de la famille et les autres dettes; mais au contraire, elle libère la femme, qui renonce à la communauté, à toutes les dettes, sans aucune exception, et qu'enfin, il n'était pas nécessaire de citer des autorités sur ce point élémentaire.

Mr. le Juge Smith.—Action for the recovery of goods and necessities to the use of the family. The Court is clearly of opinion that the wife is responsible jointly and severally with her husband, although separated. It has been so held by this Court.

Judgment for Plaintiff. (1)

Mr. Girouard, pour le Demandeur.

M. Lorranger et Frères, pour les Défendeurs.

(p. a.)

CIRCUIT COURT.

MONTREAL, 27 Feb., 1863.

Coram Monk, A. J.

No. 7373.

Kearney vs. Kinch & al.

Held:—That a promissory note, payable to order, may be validly made on the Lord's day, commonly called Sunday.

The Plaintiff brought an action to recover \$62 41c. on a note bearing date on the 18th May, 1862, against the maker and endorser. The maker made default, and the endorser *Doutney* pleaded that the note, by reason of the same being a trading contract entered into on the Lord's Day commonly called Sunday, could not be used as evidence of a commercial negociation entered into on the Lord's Day.

Per Curiam.—The Court does not know of any law, either in Canada or England, which declares that a note made on Sunday is a nullity and void.

The counsel for *Doutney* cited *Côté vs. Lemieux*, 9 Lower Canada Repts. 221, which the Court has looked at, and does not consider a precisely similar case.

Judgment for Plaintiff.

McGee & Walsh, for Plaintiff.

Day & Day, for *Doutney*.

(r. w. r.)

(1) Le 27 février 1863, cette décision a été confirmée par un autre jugement de la Cour de Circuit, Mr. le Juge Monk siégeant; dans une cause de *St. Amand vs. Persillier* dite *Lachapelle et vir*.—Note du Rapporteur.

St. Amand
vs.
Bourret et ux.

CIRCUIT COURT.

MONTREAL, 27 February, 1863.

Coram MONK, A. J.,

No. 235.

St. Amand et al. vs. Bourret et ux.

Held.—That where necessities are supplied by a trader to a husband and wife separated as to property, and delivered at their domicile for the use of their household, the husband and wife are jointly and severally liable for such necessities.

Per Curiam :—This is an action by a trader to recover \$38.37½ for necessities supplied to husband and wife, separated as to property. The jurisprudence is conflicting on this subject, but I hold that the necessities having been supplied to their household for their use, the husband and wife are jointly and severally liable.

Normandeau for Plaintiffs.

Mousseau et Labelle, for Defendants.

(F. W. T.)

Judgment for Plaintiff.

SUPERIOR COURT.

MONTREAL, 31 Octobre, 1862.

Coram MONK, A. J.

No. 1144.

Bernesse dit Blondin vs. Madon.

jugé :—1o. Que lorsqu'il existe des hypothèques et charges sur un bien vendu, il sera sursis à l'exécution du jugement, jusqu'à ce que le vendeur donne caution sous hypothèque de biens immeubles que l'acheteur ne sera jamais troublé ni inquiété.

2o.—Que le vendeur n'ayant pas offert telle caution dans le cours de l'instance, doit payer les frais de l'action. (1).

Le motivé du jugement expose suffisamment les questions soulevées en cette cause, et la décision rendue sur icelles conformément aux dispositions du chapitre 36 des statuts refondus du Bas-Canada et la jurisprudence suivie depuis.

Le jugement est comme suit :

La Cour après avoir entendu les parties par leurs avocats au mérite de cette cause, examiné la procédure, pièces produites et avoir délibéré, considérant que le dit demandeur a établi en preuve que le dit défendeur lui est endetté en une somme de \$1049.75 cours actuel de cette Province pour balance en capital et intérêts calculés jusqu'au 7 mars 1862, sur la somme de \$7000 ancien cours, montant du terme de paiement ou inalement devenu dû et échu le 1er novembre 1861, par et en vertu de l'acte de vente de la terre et prémisses décrites dans la déclaration en cette cause, fait et consenti par le dit Demandeur au dit Défendeur le 29 juillet 1861, devant Maître Grenier et son confrère, Notaires publics, et considérant que la dite vente a été faite avec garantie de tous troubles et empêchements généralement quelconques, et de plus qu'il paraît et qu'il est clairement établi par des actes et documents produits en cette cause par le dit

1) *Vide*, 6 L. C. Jurist p. 241 and p. 247.

Défendeur au soutien de son exception péremptoire plaidée en cette cause qu'à l'époque où la dite vente a été faite et consentie par le dit Demandeur au dit Défendeur, un sixième de la dite terre et prémisses appartenait et appartient à l'enfant encore mineur issu du mariage du dit demandeur avec feue Dame Marguerite Desjardins sa première femme, la dite terre ayant été un conquêt de la communauté qui a existé entre le dit Demandeur et sa dite première femme; et considérant aussi que la dite terre et prémisses lors de la dite vente étaient grevées d'hypothèques, et nommément, 1^o. pour une somme de mille livres ancien cours et intérêts, en vertu de l'obligation faite et consentie par le dit Demandeur au nommé Charles Auguste Maxime Globensky, par acte passé le 3 Décembre 1855, devant Maître Mackay et son confrère, Notaires publics, enregistré le 21 février 1859; et 2^o. par le droit que Dame Emilie Cadieux, épouse actuelle du dit Demandeur, a dans et sur la dite terre et prémisses à raison de la donation à elle faite par le Demandeur son dit mari dans le contrat de mariage exécuté le 23 novembre 1850 devant Maître Filiatrault et son confrère, Notaires publics, de la jouissance de la moitié de la maison construite sur la dite terre, ainsi que la jouissance d'un demi arpent de terre en superficie à être clos auprès de la dite maison, le dit contrat enregistré le 30 octobre 1861; Et la Cour considérant que le dit Défendeur en conséquence de ces dites hypothèques et du droit qu'a le dit mineur dans et sur la dite terre; a raison de craindre qu'il sera troublé dans la jouissance et possession de la dite terre et prémisses, et qu'en conséquence et suivant le statut en tel cas pourvu, le Défendeur a droit de retarder le paiement du dit prix de vente et de le garder entre ses mains jusqu'à ce que le dit Demandeur ait fait cesser les craintes de trouble. La Cour maintient l'exception péremptoire plaidée par le dit Défendeur à cet égard et faisant droit sur la demande du dit Demandeur, condamne le Défendeur à payer au dit Demandeur la dite somme de \$1049 dit cours actuel avec intérêt sur la dite somme à compter du dit 7 mars 1862 jusqu'à l'actuel paiement, mais la Cour ordonne qu'il soit sursis à l'exécution du présent jugement jusqu'à ce que le dit Demandeur ait donné bonne et suffisante caution sous hypothèque de biens immeubles, que lui le dit Défendeur ne sera jamais troublé ni inquiété dans la jouissance de la dite terre et prémisses à lui vendues par le dit Demandeur le 29 juillet 1861, devant le dit Maître Grenier et confrère, Notaires, à raison des dites hypothèques ci-dessus mentionnées, ou à raison du dit droit du dit mineur pour un sixième de la dite terre.

Et la Cour considérant que le dit Demandeur, ni par sa déclaration en cette cause, ni par sa réponse à l'exception du dit Défendeur, n'a offert de donner suffisante caution au dit Défendeur pour le garantir de tous ces dits troubles, condamne le dit Demandeur à payer les dépens de cette action.

Morin & Marchand, avocats du Demandeur.

Moreau, Ouimet & Chapleau, avocats du Défendeur.

F.A.L.

MONTREAL, 27 MAI, 1862.

Coram SMITH, J.

No. 1207.

Bourdeau vs. Dupuis.

JUGE:—Que dans l'espèce, le Défendeur poursuivi pour avoir certifié et délivré, en qualité de Notaire public, une copie erronée et incorrecte d'un acte de vente, n'est pas responsable en dommages par suite du refus du Demandeur de permettre au dit Notaire de la corriger aussitôt que l'erreur, dont cette copie était entachée, fut découverte.

Le Demandeur réclamait du Défendeur la somme de £52 1s. 6d. pour le montant de certains frais par lui encourus sur une inscription de faux qu'il avait faite à l'encontre d'un acte de vente passé le 3 février 1845, pardevant le Défendeur en sa qualité de Notaire Public, entre le Demandeur et le nommé Palin; et par suite de l'omission qui avait été faite dans la copie que le Défendeur lui avait donnée, d'une clause importante qui militait contre les intérêts du Demandeur, et qui se retrouvait dans les autres copies. Cette inscription de faux avait été renvoyée avec dépens. Le Défendeur répondit à cette action par deux exceptions. Par la première, il alléguait, qu'il avait informé le Demandeur de cette erreur en 1850, c'est-à-dire avant l'inscription de faux en question, et lui avait demandé de lui remettre cette copie informe afin de corriger l'erreur qui s'y était glissée, ce que le Demandeur avait toujours refusé de faire.

Par la seconde exception, le Défendeur alléguait que le Demandeur s'était inscrit en faux contre la minute même de l'acte, et avait nié sa propre signature.

Le Défendeur, par sa réponse spéciale, prétendait que l'omission dans sa copie de cette clause qui l'obligeait à une servitude très onéreuse, avait naturellement excité ses soupçons sur toute la validité de l'acte; qu'il eût renoncé trop facilement à ses droits, ou à tout recours en justice en remettant cette copie sur la simple réquisition du Notaire instrumentaire, et que cette lacune ayant pu se constater par la simple collation de la copie avec la minute, lors de l'expédition même de cette copie aussi bien qu'après, le Défendeur s'était rendu coupable d'une négligence grossière et d'une incurie inpardonnable, et devait réparer les torts et dommages qui en étaient résultés.

SMITH, J.—This is an action brought against a Public Notary for a defective copy of a Deed of Sale between the plaintiff and one Palin, passed before the Defendant as Notary. In that copy was found the omission of an important clause. The Plaintiff claims from the Defendant the amount of his costs on an *inscription de faux* against said acte, also damages which he alleges to have suffered by the dismissal of his *inscription de faux*. The Defendant's pleas raise two points, viz. 1st that the Defendant has always refused to deliver up that defective copy and have a fresh one corrected upon the minute; 2d that upon the *inscription de faux*, the Plaintiff denied his own signature to the minute, which was the only subject matter of the *inscription de faux*. The facts having been proved on the part of the Defendant, I feel compelled to dismiss this action with costs. The judgment is *motivé* as follows: considering that the said Plaintiff hath failed to establish the existence of any right of

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action against the Defendant, by reason of any thing alledged and proved in the said cause, the court doth dismiss the said action with costs.

Médéric Lanctot, Attorney for Plaintiff.

Bétournay & Ricard, Attorneys for Defendant.

(P. R. L.)

Desparois
et
Laberge.

MONTREAL, 30 SEPTEMBER, 1859.

Coram MONK, A. J.

No. 1026.

Ex Parte DESPAROIS

Sur certiorari,

ET

PIERRE LABERGE

Poursuivant en Cour inférieure.

Jugé:—Que les Commissaires pour la décision sommaire des Petites Causes n'ont pas juridiction pour adjuger sur une demande dont le titre de créance, étant pour plus de \$25, a été divisé pour donner juridiction à la Cour. Il en serait autrement si le Demandeur faisait remise de l'excédant de \$25.

L'affidavit de circonstances exposait que dans l'action portée devant la Cour des Commissaires de la Paroisse de Chateauguay, la demande se trouvait formulée comme suit: "Le Demandeur poursuit le Défendeur pour une somme de £6 5 0 sur un billet consenti par le dit Défendeur en date du 3 mars, 1857, "pour une plus forte somme."

Judgment:—Considering that by the statement produced by the Commissioners, it appears that the amount sued for in the Commissioners' Court, formed part of a sum exceeding the sum of £6 5 0, by one and the same title of debt and that by law the said Commissioners had not jurisdiction in this case, it is adjudged that the said judgment of the 2nd day of Nov. 1857 be and the same is hereby quashed and set aside, with costs against the said Pierre Laberge."

Judgment quashed.

Doutre & Daoust, pour le Requérant.

Laflamme, Laflamme & Daly, pour Laberge.
(J.D.)

MONTREAL, 31 DECEMBER, 1862.

Coram SMITH, J.

No. 1078.

Ross et al. vs. Burns.

HELD:—That the plaintiff was justified in his belief of the defendant being immediately about to leave the province of Canada, with intent to defraud the plaintiff, from the fact that the defendant had bought from the Plaintiff a large quantity of wheat for the price of \$8293.75 cts., payable cash on delivery, and had received delivery of the wheat, but had only paid a portion of the price leaving a balance of \$2793.57 cents unpaid, and that the Defendant upwards of two months afterwards was about to go abroad to Scotland, his original domicile; where his family had resided for five years, without paying the plaintiff the balance, and without leaving any property in Canada out of which the plaintiff could get paid, and after repeated applications had been made to him for payment.

The plaintiff applied on the 26th November for a writ of *capias ad respondendum* against the body of the defendant founded upon the following affidavit:—

"Frank Ross of the city and District of Montreal, in the Province of Canada,

Ross et al.
vs.
Burns.

merchant, trading at the city of Montreal aforesaid under the name and firm of Frank Ross & Co., having been duly sworn on the Holy Evangelists, doth depose and say, that—

“James Burns of Bothwell in that part of the United kingdom of Great Britain and Ireland called Scotland merchant, presently in the city of Montreal aforesaid, is personally indebted to the said Frank Ross, trading as aforesaid under the said name of Frank Ross & Co., in a sum exceeding Ten pounds sterling, to wit, in the sum of two thousand seven hundred and ninety-three dollars and fifty-seven cents currency of Canada due, as follows, to wit: as the balance of a larger sum of eight thousand two hundred and ninety three dollars and fifty-seven cents, which became due to the said Frank Ross trading as aforesaid from the said James Burns, using the name and style of James Burns & Co., as and for the price and value of seven thousand seven hundred and fifty-one bushels of wheat heretofore, to wit, at Montreal aforesaid, on or about the thirteenth day of September last, sold by the said Frank Ross to the said James Burns, at and after the price of one dollar and seven cents per bushel, to be paid in cash on the delivery thereof, and delivered by the said Frank Ross to the said James Burns at his request.

“And the deponent saith, that though the said wheat was so sold for cash on delivery and was duly delivered to the said James Burns at his request, yet he hath wholly refused and neglected to pay for the same; but hath only paid on account of the said sum of eight thousand two hundred and ninety-three dollars and fifty seven cents, the sum of five thousand and five hundred dollars, leaving a balance of two thousand seven hundred and ninety-three dollars and fifty-seven cents due and owing from him to the deponent.

“And the deponent saith that he hath reason to believe and doth verily believe that the said James Burns is immediately about to leave that part of the Province of Canada heretofore called the Province of Lower Canada, and is also immediately about to leave the Province of Canada with an intent to defraud the said deponent, and that such departure will deprive the deponent of his remedy against the said James Burns, whereby without the benefit of a writ of *capias ad respondendum* or a writ of attachment against the body of the said James Burns, he, the said deponent, will lose his said debt and be deprived of his remedy against the said James Burns.

“And deponent doth depose as follows as regards the grounds of his said belief—That the said wheat was to be paid for on delivery, and the deponent confiding in the promise and agreement of the said James Burns so to pay for the same on delivery, delivered the said wheat to the said James Burns, but the said James Burns hath violated his said agreement and hath refused to name any period for paying the said balance of two thousand seven hundred and ninety-three dollars and fifty-seven cents currency to the Plaintiff, to wit, the deponent:

“That the said James Burns is only temporarily in Montreal aforesaid, and in the said Province of Canada, and was only temporarily in Montreal aforesaid, and in the said Province of Canada at the date of said purchase, and hath now and had at the date of the said purchase no office or domicile in Montreal aforesaid, or

in the said province of Canada, and the family of the said James Burns reside in that part of the United Kingdom of Great Britain and Ireland called Scotland and that the domicile of the said James Burns is in fact in Scotland where his residence is :

"That this deponent is credibly informed and doth verily believe that the said James Burns is immediately about to return to Scotland aforesaid as the deponent hath been informed, by William Dalzell of the city of Montreal, produce dealer.

"That the said James Burns will, as deponent believes, on his said departure leave no property behind him in the Province to answer for the said debt so due by him as aforesaid to deponent :

"That the said James Burns, notwithstanding his said intended immediate departure, hath refused to pay the said sum of two thousand seven hundred and ninety-three dollars and fifty-seven cents currency to the deponent and may never return to the said Province.

"And this deposition having been read over to deponent, he declares that it contains the truth, persists therein and hath signed."

The defendant was arrested, and gave bail to the Sheriff, and thereupon presented a petition to a judge in chambers to be discharged out of custody under the provisions of the 87th chapter of the Consolidated Statutes of Lower Canada, Sec. 5.

The parties went to evidence, and it appeared in evidence that the defendant on the 30th September, 1862, had bought from the plaintiff a large quantity of wheat, payable cash on delivery. The wheat was delivered, but the price was only paid in part, leaving a balance of \$2793.57 unpaid, though repeated applications were made to the defendant for payment.

He had no permanent domicile in Canada, and was there for temporary purposes of trade ; the domicile of his family was in Scotland, where a house was rented for them, and his own original domicile was in Scotland. He had married in Quebec, and lived there for some years, and then removed to Montreal with his family, where he kept house for several years ; and in 1857, he gave up his house and housekeeping in Montreal, and removed his family to Scotland, where he remained with them about a year ; and then leaving his family in Scotland, he returned to Montreal for purposes of business ; and since A.D. 1857, he had spent 8 months of the year in Montreal, for business purposes, boarding with his brother-in-law, James Johnston, in Montreal and the other four months of the year he had spent with his family in Scotland, at their residence. His place of business in Montreal, consisted of a room which adjoined another room occupied by his brother Adam. In his absence his brother acted as his attorney.

It was undoubted that he was to leave Canada for Scotland, in the month of December, without paying the plaintiff, and without leaving property behind him to pay him.

After hearing, the judge remarked as follows :—

Koss et al.
vs.
Burns.

SMITH, J. This was a petition to discharge a debtor arrested on *capias*. The Plaintiff had sold to the Defendant a quantity of wheat for cash. There was a balance due of \$27.00, and on this the arrest was made, the grounds being that the Defendant had no property here; no domicile; was here for a temporary purpose merely, and was about to leave for Scotland with the purpose of residing there, and all this with the intention of defrauding his creditor. Mr. Burns now said that he had a domicile here and was going to Scotland only for a temporary purpose, his family being domiciled there merely for the purpose of education—that in fact he never ceased to have a domicile here, though his family had left the country. The facts were that Mr. Burns had his original domicile in Scotland. He resided here for thirty years and went home in 1857 with his family. After twelve months he returned, and having bought this wheat for cash and not yet paid for it, was actually returning to Scotland. He had already rejected a motion to quash, and that would certainly have been the decision in England or in Scotland—the law in the latter country especially, being exactly like our own, and he must decide the present petition on the same principles. Mr. Burns was a very respectable man, with whom he had a personal acquaintance, and he had no idea that he intended to defraud his creditor, but he had no domicile here, he lived with his brother-in-law. His office was at his brother's office, he had no property and he acknowledged that he was going to leave the country,—he said to arrange for next year's business; but *non constat* that his arrangements would ever be made; or that he would ever in fact return here. He (Mr. Justice Smith) did not believe that the Defendant intended fraud, but had he done anything which, in the eye of the law, manifested that intention, anything which gave his creditor a fair claim to exercise his remedy? If it were necessary to prove what a man meant to do in his own brain or heart, no such proof could ever be made. The question could only turn upon facts upon which a creditor could say, "You are withdrawing from the jurisdiction, and for all I know your withdrawal may be forever." His honour read from Bell's commentaries on the Scotch law, which he said was identical with our own on this point, to show that a debtor must remain in the jurisdiction until after judgment. That was the true principle. Otherwise a debtor might put his hands into his pockets; and say "I have nothing here, I am going away, and you can do nothing; for it is true just now I mean to come back again." It was easy to imagine the state of things that would result from debtors being at liberty to act thus, merely because a creditor could not prove their secret intentions to defraud, and therefore could have no remedy. He was sorry to have to reject the petition but he was bound to act on the law without reference to individuals.

The judgment was *motivé* as follows:

The Court, having heard the parties by their Counsel upon the petition of the said defendant presented on the 13th of December instant, praying that the writ of *Capias ad respondendum* issued on the affidavit of the said plaintiff, at the suit of the said plaintiff, and under which writ of *Capias ad Respondendum* the said defendant, petitioner, was arrested, be declared to have issued illegally, that the said defendant be released from custody and discharged, and all proceed-

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ings be set aside and declared null and void, and the sureties of said petition discharged from all liabilities under and by virtue of the proceedings in this cause had,—having examined the said petition, the proceedings and the evidence adduced, and deliberated, considering that the said defendant hath failed to establish the allegations of his said petition or to disprove the allegations and matters set forth in the affidavit of the said plaintiff, doth reject the said petition with costs.*

Ross et al.
vs.
Burns.

Torrance & Morris, for plaintiff.

A. & W. Robertson, for defendant.

P. W. T.

Petition dismissed.

MONTREAL, 31st OCTOBER, 1862.

Coram BADGLEY, J.

No. 1284.

Sauvageau vs. La Compagnie du Richelieu.

Held:—That in case submitted, being a case of collision between a steamboat and a sailing vessel on the River St. Lawrence, no proper measures having been taken to prevent all reasonable probability of a collision on board of the Plaintiff's vessel, and said vessel not having the lights required by law; the Plaintiff cannot claim any damages.

BADGLEY, J.

In this case the Plaintiff sues in damages for the loss of his barge, from an alleged collision with the steamer "Columbia." The facts of the case are these: On the night of the 11th Oct., 1861, the steamer "Columbia" was on her downward passage to Quebec, and had reached nearly to Sorel. She was following her usual course, hugging the south shore, when, passing some vessels lying so much in shore as to prevent her safely continuing her course inside of them, she sheered off a little to the north to give them a berth before she rounded the point and came into the harbour of Sorel. She proceeded north but a little way when she took her course as usual to round the point, and in doing so saw a large vessel lying at the mouth of the Richelieu River, with her lights up and burning, upon which, there being no obstruction between the two, the steamer directed her course so as to get safely into Sorel; the distance between them could not have been great and the steamer's way, under steam, would, in a very short time place her at her berth at Sorel.

The steamer thus was going diagonally, but in proceeding to do so, a vessel of some kind, with her lights burning, appeared to be coming up the river, but to the north of the ship at anchor.

This vessel was going straight ahead before the wind, and came athwart the Columbia, striking the latter near the forward gangway at about sixty feet from the bow of the steamer, breaking in several of the upper deck berths and doing

* NOTE.—Authorities cited by Plaintiff.—*Benjamin vs. Wilson*: 1 L. C., Repts, 351.—*Wilson vs. Reid*, 4 L. C. Repts., 218.—*Omin vs. Atcheson*, 4 L. C. Repts., 378.—*Lefebvre dit Vermette vs. Tulloch*, 5 L. C. Repts., 42.—*Hasset vs. Mulcahey*, L. C. Repts. 15.—*Tremain vs. Sansum*, 4 L. C. Jur., 48.—*McDougall vs. Torrance*, 5 L. C. Jur: 148.—CITED by the Court. 2 Bell's Comm: *Laws of Scotland*.—Book VI., Part III: Chap III. Of the imprisonment of debtors as in *meditationes fugae*.—

Sauvageau
vs.
La Compagnie
du Richelieu.

damage. The vessels separated, the steamer proceeded to Sorel, and the vessel, it seems, soon after foundered and sank.

The action is brought to recover the value of the vessel, and it is alleged that the loss was occasioned by the negligence, mismanagement and want of skill of the persons on board of the Columbia, by the divergence from her usual course in going down the river; and by the Columbia striking and sinking the Plaintiff's vessel.

The Defendant pleads that the steamer was proceeding on her usual course with all the lights required by law, that the night was dark and raining, that the collision could only come from the vessel sailing up, that she was without the lights required by law, and that she was out of her course and going contrary to the laws and regulations of the river, by which she should have gone to the north, the river being very broad there, and that she collided with the Columbia. The inattention, and want of skill, and mismanagement, were on her part and of those on board of her. Now, taking the law on the subject from the reports of the learned admiralty judge in this province, and adopting his language, it is as follows. "In cases of collision, the collision and damage may arise, first, from the fault or misconduct of the vessel suffering from the collision; or, secondly, the accident may have happened from unavoidable circumstances, without fault on the part of either vessel; thirdly, both parties may be to blame, as when there has been a want of skill or due diligence on both sides; or fourthly, the loss and damage may be owing to the fault or misconduct of the vessel charged as the wrong-doer."

In the first two cases no action lies for the damage arising from the collision, in the third case the law apportions the loss between the parties, as having been occasioned by the fault of both of them.

Now, in this case was the fault or misconduct on the part of the "Columbia?" It is in evidence that she had all her lights, that she was steering in a due course towards the vessel lying at the mouth of the Richelieu River, that there was no object to interrupt her course, that she did not collide with, or strike the Plaintiff's vessel, that her engine was stopped as soon as possible, and that her people, pilots, &c., called out to those on board of the plaintiff's vessel to go to the north.

It is said that the accident was by a fault in the Columbia going north, and then steering direct south, which was the principal or direct cause of the collision, and that the Columbia cannot claim exemption from liability in the event of damage from inevitable accidents, the rule being *quando culpa præcessit casum tunc casus fortuitus non excusat*.

But if there was no want of skill and discretion in her course, the Columbia is not answerable, the collision thus having arisen from, *vis major*. Now, as to the course of the Columbia, it is established that the usual course is along the south shore, but, seeing the vessels at anchor, it was her duty, whether the vessels at anchor were so in a proper or improper place, or properly anchored or not, to avoid collision with them, she was compelled to go slightly north for a little way and thence to go south round the point into Sorel; this is proved to be the usual course in such cases.

Sauvageau
vs.
La Compagnie
du Richelieu.

With reference to the Plaintiff's vessel, was there any fault there:—
It seems she was sailing with a fair wind, the wind being north north-east, that her sails were very large and appeared to prevent the steersman from seeing ahead, that she saw the steamer taking her south course and did not make any attempt to avoid collision and that she struck the steamer with her bow and bowsprit, showing that she was going athwart the steamer's course. Now, steamers, by nautical law, are to be considered as vessels navigating with a fair wind. The Columbia, therefore, and Plaintiff's vessel, which was sailing with a fair head wind were upon an equality.

The sailing rule required the Plaintiff's vessel to steer so as not to cross the course of the Columbia, and to avoid collision. This is the prevailing rule and custom of the River, and evidently seems to be the rule of good seamanship.

There was time enough to steer the vessel out of the way of the Columbia and plenty of river to do it in. When the Plaintiff's people first saw the south course of the Columbia, there was a considerable distance between them and sufficient to take the vessel out of the Columbia's course, and they had no right to calculate the chances and risk the danger of a collision by continuing their course without alteration. No proper measures had been taken by them to prevent all reasonable probability of a collision; there was no person forward to see how things were going; and the circumstances proved, indicate that they were in fault and therefore came within the first rule for collision above adverted to, the fault or misconduct of the vessel suffering from the collision, and ergo the Defendants can be liable to no damages.

But there is an additional and very strong ground.

The Columbia had all her lights as required by law, the Plaintiff's vessel had not, (see Consolidated Statutes of Canada, page 553, Sec. 3, sub-sec. 1, 2, 3,) the Plaintiff's vessel had only two lights, a red on one side, and so pale a green one as to be taken for a white, placed in front of the mast on the deck. Now, this omission to have the legal lights amounts to negligence *per se*, and from the testimony it is warrantable to conclude that the omission was a principal and substantial cause of the casualty.*

For all these grounds the Defendants are not liable, and the action must be dismissed. I have omitted other grounds of objection, as those which I have adverted to appear sufficient.

Dorion, Dorion & Sénécal, attorneys for Plaintiff.

LaFrenaye & Armstrong, attorneys for Defendants

(P. R. L.)

* See page 554, Statutes of Canada, Sec. 8.

Senauer et al.,
vs.
Porter et al.

MONTREAL, 17TH OCTOBER, 1862.

Coram SMITH, J.

No. 278.

Senauer et al., vs. Porter et al.

Held:—That although the Defendants reside in Lower Canada, yet an action under the lessors and lessees' act for the rescission of a lease of a property situated in Upper Canada, is not within the jurisdiction of a Court of Law in Lower Canada.

By their declaration the Plaintiffs alleged that by a lease *sous seing privé* made at Montreal on the 3rd April, 1861, between Plaintiffs and Defendants, the latter leased to the Plaintiffs for the term of three years from the first of May, 1861, all that store, shop, and cellar beneath the same, situate on the north side of Spark's Street in the City of Ottawa, in the store block known as Porter's Block, &c.; and that at the expiration of the first year the lessors would, "at their own cost, place and put in the two windows and shop door of said leased premises, plate glass in lieu of those which were there put up," &c.

The Plaintiffs further alleged that, although often requested, the Defendants neglected to comply with the terms of said lease, and, in consequence of such failure they prayed "that the said deed of lease be declared to have been broken and annulled and may be cancelled and set aside and the said plaintiffs released therefrom, unless the said Defendants choose and prefer within a time, to be fixed by this honourable court, to make the said improvements. The whole with costs."

This action was met on the part of the Defendants by an *exception déclinatoire*; grounded on the following reasons, to wit:—

First, Because it does not appear in and by the said declaration that this honourable court hath any jurisdiction over the Defendants, to compel them to appear and answer in this cause to the Plaintiff's action and *demande*.

Secondly, Because this honourable court hath no jurisdiction, power, or authority to cancel or set aside a lease of real property situated in that part of this province formerly Upper Canada, and the real property, the lease of which is sought to be set aside by the present action, is situate at Ottawa City in that part of the Province of Canada, formerly Upper Canada.

Thirdly, Because the cause of the present action arose within that part of the Province of Canada, formerly Upper Canada; and the said action can only be tried and determined according to the laws of the aforesaid part of the said province.

Fourthly, Because there is no law in force in that part of this province formerly Lower Canada, under which the said cause can be tried and determined.

Fifthly, Because this honourable court could not render any judgment in this cause which could be executed in Upper Canada, the place where the cause of the present action arose. (1.)

Sixthly, Because the law under which the lease now sought to be cancelled and set aside, was made, to wit: the Statute of this province, the 22nd Victoria chapter 92, intitled, "An Act respecting short forms of Leases," only applies to

(1.) Vide Story, conflict of laws.

and has force and effect in Upper Canada, and has no force or effect whatever in Lower Canada. Senauer et al.,
vs.
Porter et al.

The judgment of the court, although not *motivé* sustains the *exception déclinatoire* for the above reasons, and in the following terms :—

The Court, having heard the parties by their counsel upon the *exception déclinatoire* pleaded by the Defendants in this cause, having examined the proof and deliberated thereon, doth maintain the said *exception déclinatoire* with costs, and in consequence doth dismiss this action with costs.

B. Devlin, Attorney for Plaintiffs.

J. Monk, Attorney for Defendants.

P. R. L.

MONTREAL 31ST DECEMBER, 1862.

Coram SMITH, J.

No. 2688.

De Beaujeu vs. Rodrigue.

Held :—1. That a motion for *peremption d'instance* made in the names of three attorneys, one of whom was deceased, will be rejected.

2.—That such a motion might be made in the names of the two survivors, without a substitution of attorneys.

This case, and three others of the same nature, were decided upon the following grounds :

The defendant was represented by Messrs. Doutre, Daoust, and Doutre. One of these gentlemen, Mr. Pierre Doutre, died, and the remaining two came before the court retaining the same name, Doutre, Daoust and Doutre, and moved that the *instance* be declared *perimée*.

Per Curiam.—There are four cases in which the same questions come up. *Peremption d'instance* has been moved for in all, by the attorneys to the record, Messrs. Doutre, Daoust, and Doutre. But Mr. Pierre Doutre has died since the commencement of the action, and therefore cannot now act. It was argued that this was a legal copartnership, which like other copartnerships was an *être moral*, and as such might act like individuals. But there was no such thing as a copartnership of brains.

The Court must know the attorneys who appear before it, and it is as impossible for advocates to continue to sign the names of a deceased partner as it would be for them to assume the style of old firms which had ceased to exist, which was nevertheless possible with mercantile copartnerships. An advocate certainly could not represent himself as O'Sullivan and Grant.

The survivors might have styled themselves Doutre and Daoust, without any substitution of attorneys, but they cannot make an application to the court in the name of a dead man.

Motion rejected.

R. & G. Laflamme, for Plaintiff.

Doutre, Daoust, and Doutre, for Defendant.

(G. L. M.)

MONTREAL, 31st DECEMBER, 1862.

Coram Smith, J.

No. 1179.

Febriuyer v. Poirier and Decaré, Garnishees.

Held:—that a Plaintiff having attached a sum of money in the hands of the Garnishee belonging to the Defendant, he cannot make a motion that the Court would order the Garnishee to pay the Plaintiff the amount in deduction of the amount due the Plaintiff on a judgment against the Defendant.

The Plaintiff sued out a *saisie arrêt* after judgment against the Defendant, and attached certain moneys due the Defendant in the hands of the Garnishee.

The Plaintiff then made a motion to the effect that the Court would order the Garnishee to pay him £55. 7s. 4d., acknowledged by the Garnishee to be due the Defendant.

Per Curiam.—The Plaintiff can take nothing by this motion. The proper course for the Plaintiff to take is to inscribe the cause for hearing on the merits of the attachment.

Drummond and Bélanger for Plaintiff.
(F. W. T.)

Motion dismissed.

MONTREAL, 31st DECEMBER, 1862.

Coram SMITH, J.

[No. 915.]

Beaudry vs. Vinet.

Held:—1st. That in a plea to an action for debt where defendant admits the indebtedness, but alleges that Plaintiff is indebted to him in a larger sum, if compensation be not expressly prayed for, there must at least be something to shew that the plea is a plea of compensation.

2nd. That where a defendant by his plea to an action for debt sets up that the Plaintiff is indebted to him in a larger sum, but does not by the terms of his plea shew that it was intended for a plea of compensation, the said Plea will be dismissed on a demurrer, with leave to Defendant to replead.

The Plaintiff's declaration alleged that the Plaintiff was a priest, Curé of the Parish of St Constant in the District of Montreal; that the defendant, also a priest, had been the Plaintiff's predecessor as Curé over the Parish of St Constant, having left the said Parish on the 16th May, 1861.

The declaration went on to state, that, according to law and the custom of this country the ecclesiastical year as regards the *dime* due, commences at St Michel, viz., the 29th September of each year, and ends at St Michel of the following year. In the case where different *Curés* succeed each other in the Parish during the ecclesiastical year, the *dime* due for that year is divided between them *pro rata*. The defendant had collected the whole of the *dime*, to more than a third of which the Plaintiff was entitled, but as part had been paid or compensated for, a balance of £42.10 was claimed.

The defendant by a pleading called *exception and défense* admitted the justice of Plaintiff's demand, but alleged that the Plaintiff owed him a larger sum of money, for which the Defendant also became incidental Plaintiff. There

was no allegation of compensation in the body of the plea, nor in the prayer, which was as follows:—"Pourquoi le défendeur se réservant de prendre les conclusions qu'il a droit de prendre contre le demandeur pour répéter de lui ce qu'il a payé de plus qu'il n'était dû audit demandeur, conclut au débouté de la dite action avec dépens."

To this plea, Plaintiff demurred as insufficient.

Per Curiam. Plaintiff was a *Curé* who had succeeded to the Parish which defendant, also a *Curé*, had left. The latter had collected the tithes for a term part of which had been served by the Plaintiff. Plaintiff claimed his share. Defendant's answer was that the Plaintiff was not entitled to recover, because he owed the defendant a larger sum. He did not pray that his claim should, be compensated against that of the Plaintiff. Now, even adopting the extreme view of the Court of Appeals, that you need not expressly pray that one debt should be compensated by the other, there must still be something to shew that compensation was the theory of the Plea. It did not necessarily follow that because Plaintiff owed defendant one debt he should not have a right of action for another due him by defendant. The demurrer of plaintiff to defendant's plea maintained with leave to plead again within twenty days from date of judgment.

Demurrer maintained.

D. Girouard for Plaintiff.

Médéric Lanctot for Defendant.

(J.L.)

MONTREAL, 31 October, 1862.

Coram, SMITH J.,

No. 1211.

Langlands, tutor, *vs.* *Stansfield et al.*

Held,—That a tutor appointed to accept a donation and to collect interest arising from an obligation, cannot maintain an action at law until his tutorship has been registered. (1).

The judgment being *motivé*, it is sufficient to give the same *in extenso* in order to elucidate the decision therein rendered upon the issue raised in this cause.

The Court, having heard the Plaintiff and Joshua Stansfield one of the said Defendants, by their respective counsel upon the merits of this cause, Martha Stansfield and Murdoch Morison, the other Defendants in this cause, not having pleaded to the action and being duly foreclosed from so doing, and not having appeared at the said hearing, having examined the proceedings and documents of Record and deliberated, considering that the Tutorship of the twentieth July, one thousand eight hundred and sixty, by which the said Plaintiff was named and appointed Tutor to accept a certain donation therein mentioned, and to collect the interest arising from a certain obligation dated the twenty-fifth of June one thousand eight hundred and fifty-five, had not been enregistered as required by law previous to the institution of the present action and considering that the Plaintiff brought the present action in his quality and capacity of Tutor under and

(1). Ch. 37 C. 6. of L. C. Section 33.—"No action shall be maintainable... by any tutor to a minor... until after registration by memorial, or at full length... of the appointment of such tutor...."

Langlands
vs.
Stansfield et al. by virtue of the said Tutorship of the twentieth July, one thousand eight hundred and sixty, and that by law such *acte de tutelle* should have been enregistered previous to the institution of the present action, and seeing that without such registration, no action could be legally brought thereon, doth dismiss the Plaintiff's action, with costs, saving to the Plaintiff his recourse as to law and justice may appertain.

A. & W. Robertson, Attorneys for Plaintiff.

Loranger & frères, Attorneys for Defendant, Stansfield.
(P.R.L.)

MONTREAL, 20TH MAY, 1862.

Coram BADGLEY, J.

No. 1482.

Hobbs vs. Seymour et al.

Held:—That a motion by a bailiff to amend his return of service of a Writ (an *inscription de faux* having been made against said return) will be rejected with costs.

Cross & Bancroft, for Bailiff.

T. McCord, for Defendant.

J. L. M.

MONTREAL, 27TH SEPTEMBER 1862.

Coram MONK, A. J.

No. 1482.

Hobbs vs. Seymour et al.

Held:—That a petition by a bailiff to be allowed to amend his return of service of a Writ, will be granted on payment of the costs occasioned by the error.

Two of the Defendants in this cause were doing business at Ottawa in copartnership. The Bailiff, Robert McCormick, returned that he had served one of the Defendants personally at the St. Lawrence Hall in Montreal, their office or usual place of business.

The Defendants filed an *inscription de faux* against the Bailiff's return. A petition was now presented on behalf of the Bailiff praying that he be allowed to amend his return by striking out the words "their office or usual place of business," where they occur therein, and substituting in their stead the words "The St. Lawrence Hall Hotel."

This petition was granted. The remarks made by the Court will sufficiently explain the case.

Per Curiam.—This was an action against two persons doing business at Ottawa. The Bailiff returned that he had made a personal service on one of the Defendants at the St. Lawrence Hall, *their usual place of business*. Defendants filed for plea to the action a *demurrer* and an *exception à la forme* and an

inscription de faux against the Bailiff's return, on the ground that as the Defendants did business in Ottawa, the St. Lawrence Hall could not be their usual place of business, as returned by the Bailiff. The Bailiff immediately presented a motion in Court before Mr. Justice Badgley, to amend his return, admitting that he had made a mistake. This motion was rejected, it being decided that the Bailiff could not come into the cause by a motion. The case at the present stage comes up on the petition of the Bailiff to be allowed to amend his return. The Court will grant this petition on payment of all costs occasioned by his irregularity.

Hobbs
vs.
Seymour et al.

Cross & Bancroft, for Petitioner.
T. McCord, for Defendants.

Petition granted.

J. L. M.

SUPERIOR COURT.

MONTREAL, 21st FEBRUARY, 1963.

Coram MONK, J.

No. 710.

Bullitt et al vs. Shaw et al.

Held:—1. That a Plaintiff in an action on a promissory note, sufficiently sets out the contract by alleging that the note was made simply without alleging that the note was signed.
2.—That the allegation that the Defendants made a note, payable to the order of C. & M., who then endorsed and delivered the note to the Plaintiff, is sufficient without the allegation that the Defendants delivered the note to the said C. & M.

The Plaintiffs declared upon a promissory note against the Defendants in the following terms: "The Defendants, &c., &c., made their certain promissory note in writing, bearing date at Philadelphia, &c., and thereby, nine months after the date of the said note, promised to pay to the order of Crissey and Markley \$165.10 &c., and the said C. & M. then endorsed and delivered the said note to the Plaintiff, &c."

The Defendants demurred to the declaration in substance on the ground that the declaration did not allege that the Defendant signed the note, and that it did not allege that they delivered the said note to the said Crissey & Markley.

PER CURIAM:—The allegation that the Defendants made the note is sufficient as the note could not be made without being signed. The omission to allege the delivery of the note by the makers to the buyers is irregular, but there is an allegation that the note was endorsed and delivered by the payees to the Plaintiffs, which could not have been without a previous delivery by the maker to the payees, C. & M. It would have been better to have alleged the delivery by the maker to the payees, but, under the circumstances, I hold that the declaration is sufficient.

Griffin, Q. C., for Plaintiffs.
Kerr & Nagle, for Defendants.

(F. W. T.)

Demurrer dismissed.

CIRCUIT COURT.

MONTREAL, 27th SEPTEMBER, 1862.

Coram BADGLEY J.

No. 7286.

*Rolland vs. Reuger and Lafontaine.**Mis en cause.*

Held.—That a rule taken against a Bailiff who has made no return to a Writ of Execution with which he was charged, asking that he be declared in contempt of court and imprisoned until he pays the debt and costs, unless he shows cause, will not be declared absolute.

In this case a rule was taken against the Bailiff charged with a writ of execution against the moveables of the defendant, ordering him to appear before the court on a day certain, to shew cause why he should not be declared to be in contempt of court, and imprisoned until he paid the plaintiff £29 14s. 3d., principal and interest and costs, because he had made no return to the writ of execution.

Per Curiam.—The court cannot grant such a rule. The Bailiff cannot be held responsible for more than the value of the effects seized, which may amount to a great deal less than the debt. The first thing to be ascertained must be as to what effects are seized. The court will therefore order the bailiff to make his return within forty-eight hours after service upon him of the present order.

Denis & Desnoyers, for Plaintiff.

(J. L. M.)

MONTREAL, 22ND DECEMBER, 1862.

Coram SMITH, J.

No. 578.

ANDREW ROBERTSON, ET AL.,

VS.

PLAINTIFFS.

ANNE JANE ATTWELL,

DEFENDANT.

AND

DONALD LORN MCDUGALL,

GARNISHER.

Held:—1st. That an affidavit for *Saisie arrêt avant jugement*, in which deponent says that without the benefit of a writ, &c., Plaintiffs may lose their debt or sustain damage, is bad.

2nd.—That the Jurat of an Affidavit, to be valid must contain the words "sworn before me" (or us) at Montreal this—

3rd.—That writ of *saisie arrêt* on such insufficient affidavit will be quashed on motion.

The Plaintiffs in this cause issued process of *saisie arrêt jugement* on a claim of \$120 cy., and by the affidavit of one of them declared "that without the benefit of a writ, &c., plaintiff MAY be deprived of his remedy, and MAY lose his debt and sustain damage." The jurat was to the effect "sworn at this city of Montreal, this 3rd day of November, 1862." After the return of the action, PERKINS for defendant moved the court (December term) to set aside the affidavit and quash attachment, for:—

1st.—There was no proof on oath of certainty of loss of debt or sustaining damage. Robertson et al.,
vs.
Attwell,
and
McDougall.

2nd.—That the words of the statute were sacramental, and had not been followed.

3rd.—That *jurat* was irregular, and bad.

4th.—Affidavit was insufficient—and cited Heugh, et al. Ross, et al. (Monk, J.,) Superior Court, Montreal October term.

Cons. Stats., L. C., p. 717 and p. 774.

L. C. Reports, vol. 9, p. 305, Warren et al., vs. Morgan.

" " vol. 10, p. 205, L'Horst vs. Batts.

" " vol. 11, p. 5, Talbot vs. Donnelly.

ROBERTSON—contra—argued that case Heugh et al. vs. Ross et al., could not apply as then in appeal, under writ allowed by the court, and that affidavit met the requirements of law, and was altogether sufficient.

SMITH, JUSTICE.—The affidavit is insufficient as not shewing certainty required by law. The *jurat* is irregular, though signed by the officer of this court, and therefore the *saisie arrêt* issued must be quashed.

John Dunlop, for Plaintiffs.

J. A. Perkins, Jun., for Defendant.

(S. A. P. ET.)

MONTREAL, 14TH FEBRUARY, 1863.

CORAM SMITH, J.

No. 29.

Auld vs. Laurent et al.

Held:—That a landlord claiming a right of lien against a piano occupying premises leased by him to a person, cannot sue out a writ of *Saisie Revendication* to attach the piano in the hands of a third party who broke into the house and removed the piano therefrom, and pray the Court to order the return of the piano to the house in order that the same may answer for his rent unless the landlord also join his tenant in the action as his debtor.

The facts of the case were as follows: Auld had leased to one John W. Berwick, with prohibition against subletting a house in St. Antoine Street, belonging to his wife, for a sum of £45 and assessments, and gave him possession in May, 1860. Berwick remained in possession by tacit reconduction, till November 1861, when without the knowledge of his landlord, he sublet the house to one Pradget, who forthwith went into possession, and acquired certain furniture in the house belonging to Berwick, and also placed in the house as a meuble meublant, a piano which he had hired from the Defendants. The Plaintiff was ignorant of the proprietorship of the piano being in the defendants. Some time in February 1862, Pradget left Montreal, and removed all his furniture in the house excepting the piano. On the 18th March, 1862, the Defendants without notice to the Plaintiff, and having heard of the withdrawal of Pradget, sued out a Writ of *Revendication* to attach the piano as their property in the hands of Pradget; and being unable otherwise to enter the house, they procured the order of a Juge permitting the seizing Bailiff to break open the door in order to make the seizure which was done and the piano, was removed by the

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Defendants, without the knowledge of the Plaintiff. Within eight days afterwards, the Plaintiff was made aware that the Defendants had broken open the door of the house and removed the piano, and forthwith he sued out a Writ of *Saisie Gagerie par droit de suite* attaching the piano in the hands of the Defendants as the holders thereof for the purpose of bringing the piano back to the house.

The Plaintiff, in his declaration, set up the lease for £45 and assessments to Berwick, with prohibition to sublease; the possession by Berwick; the non payment of rent and the indebtedness of Berwick to the amount of £22 10s. for two quarters of rent ending the 1st May, 1862.

That the rent of the said house was reasonably worth the said sum of £45 and the assessments: That among other articles of very trifling value with which Berwick had furnished the house as security for the rent, there was in the house a certain piano which was in fact the only security the Plaintiff had for the payment of the said rent, and was of the value of £30 and upward: that on the 18th March, 1862, within 8 days before the institution of the action of the Plaintiff, the Defendants, without the knowledge and consent of the Plaintiff, had broken into the said house, and unlawfully removed from it the piano, for the purpose of defrauding the Plaintiff of his lien on the piano: that they had by the said forcible entry into the premises damaged the same to the amount of ten dollars.

The conclusion of the declaration was in the following terms: "by reason of all which said premises and by law the Plaintiff hath a right to bring suit and he doth hereby bring suit and prays that a writ of *saisie gagerie par droit de suite* may issue to seize and attach in the hands of the Defendants the said piano which was in the said house so leased as aforesaid, and which had been by them removed from said house, and that by the judgment of this Honorable Court it may be declared and adjudged that the said piano so to be seized and attached under the Writ of *saisie gagerie* to issue in this cause is subject to a lien and privilege in favour of the Plaintiff for all the rent due and to become due, to wit, the sum of £22 10s. Cy., under the said lease and *tacite reconduction*, and thereupon the *saisie gagerie* or attachment of the said piano may be declared good and valid; and the Defendants jointly and severally ordered and adjudged within such delay as the Court may appoint to replace and bring back at their own costs and charges to the house, leased as aforesaid to the said Berwick the said piano to the end that the same may be forthcoming to answer as gage for the payment of the said rent or sum of £22 10s.; and that the said piano may be sold, and out of the proceeds of the sale thereof, the said Plaintiff may be paid the said sum of £22 10s.; and in default of the Defendants replacing and bringing back the said piano to the said house No. 140 St. Antoine Street within such delay as the Court may order that they may be jointly and severally adjudged and condemned to pay and satisfy to the Plaintiff the said sum of £22 10s. for said rent; and further that the Defendants be adjudged and condemned jointly and severally to pay and satisfy to the Plaintiff the said sum of £10 and for damages as aforesaid, the whole with costs."

The Defendants firstly in effect pleaded that one William Pradget having

taken possession of the said piano, on or about the 7th December, 1861, they had sued out of the Circuit Court a Writ of *Saisie Revendication* against the said Pradget as *détenteur* of the said piano, that they had entered the said house and had taken the said piano by the hand of justice, which action was still pending; that they did not know Berwick, and that he had not since the first May, 1861, occupied the said house: that the said Berwick had never been in possession of the piano, and that the Plaintiff had no right of pledge *droit de suite* upon the said piano.

The Defendants further pleaded the general issue.

SMITH, J.—After stating the facts said that the principle in law was undoubted that the lessor has a right of gage on furniture placed in the house though the furniture be the property of a third party. The only difficulty arose out of the facts. The action was brought against Laurent and Laforce alone. The action is defective in form. It is an action against the piano alone. It ought to have been against the tenant debtor also. In the case of Aylwin vs. Gilloran 4 L. C. Repts., 360, cited at the bar, the debtor was in the record. It is clear that the action is defective in form and must be dismissed with costs.

The judgment was *motivé* as follows:

"The Court * * * considering that the said Plaintiff hath failed to show any right in law by reason of any of the allegations of the said Plaintiff in his declaration to have or maintain the conclusions of his said action as brought, doth dismiss this action with costs, &c."

Action dismissed.*

Torrance & Morris, for Plaintiff.

S. Rivard, for Defendant.

E. Barnard, Counsel for Defendant.

F. W. T.

MONTREAL, 31 Octobre, 1862.

Coram MONK, J. A.,

No. 2288.

Gauthier vs. Dagenais.

Jugé.—10. Que la dot consistant en une somme d'argent est aliénable par la femme séparée de biens de son mari et de lui dûment autorisée à céder cette somme à un tiers,
20. Que l'intérêt sur cette somme dotale ne court que du jour de la demande judiciaire.

Le Demandeur réclamait la somme de \$75, balance de la dot que le Défendeur avait constitué à sa fille Delphine Dagenais par son contrat de mariage, avec François Leclair, reçu le 13 avril 1855 par-devant Maître Houlé et son confrère Notaires; avec intérêt depuis l'échéance *ex natura rei* et laquelle somme avait été transportée au Demandeur par acte de cession reçu le 12 mars 1862 Houlé, N. P. par la dite Delphine Dagenais alors séparée de biens de son mari, mais par lui dûment autorisée à ce faire moyennant la somme de \$86.

Entr'autres moyens de défense, le Défendeur plaide que cette dot n'était pas aliénable et que la cession que sa fille en avait ainsi faite au Demandeur était

* Authorities cited by Plaintiff, Aylwin vs. Gilloran 4 L. C. Repts. 360, Pothier—Louage No. 242.

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nulle, et ne donnait aucun droit d'action au Demandeur, qui n'en pouvait être saisi en loi, et qu'il n'y avait en loi aucune action pour dot contre le père par l'enfant comme le dot était une obligation naturelle.

Monk J., the action is for \$95, being \$75 for balance of a dot and \$20 for interest. The interest can be given only from the *demande*. This dot consists of a sum of money given by the Defendant to his daughter Delphine Dagenais, *enfant commun* from his marriage with Marie Louise Abraham dite Courville. The action is properly brought against the Defendant—the marriage of Delphine Dagenais and François Leclair is not formally alleged but it is proved *aliunde*. This dot is not an *obligation naturelle* in this case; being stipulated in and by a contract of marriage. It must therefore be enforced. The question whether the dot is *inaliénable* suffers no difficulty in the *Pays de droit écrit*. But in this case, the wife having the absolute control of her property by the *séparation de biens* could transfer this sum of money with the authority of her husband, according to the principles of law followed in the *pays de droit coutumier* which we are bound to follow in this country.

L. W. Sicotte, avocat du Demandeur.

J. A. Perkins, avocat du Défendeur.
(P.R.L.)

Judgment for Plaintiff.

MONTREAL, 31 DECEMBRE, 1862.

Coram SMITH, J.

No. 1231.

Boyer et al., vs. Prieur et al.

Jugé: Que les Défendeurs ayant acheté de la fleur, livrable aux magasins des Demandeurs, de temps à autre, à la demande des acheteurs, la vente est parfaite, quoiqu'il n'y ait pas tradition au moment du contrat, et que la fleur demeurée aux dits magasins est la propriété des acheteurs et à leurs risques et périls.

La déclaration alléguait que, le 24 mai 1859, les Demandeurs avaient vendu une quantité de fleur, formant en totalité une somme de \$347,50, sur laquelle les Défendeurs avaient payé \$25; que les Défendeurs avaient requis les Demandeurs de demeurer dépositaires de la fleur pour quelques jours, après lesquels les Défendeurs devaient la prendre et faire expédier hors des magasins des Demandeurs, promettant aussi, les Défendeurs, payer le prix de la fleur sous quelques jours; que les Défendeurs, quoique souvent requis et mis en demeure de prendre la dite fleur, auraient toujours négligé de le faire; que vers le 9 septembre, après plusieurs notifications faites aux Défendeurs, les Demandeurs vendirent la dite fleur, ainsi qu'il est d'usage en pareil cas, pour le compte et aux risques des Défendeurs, que la fleur ainsi vendue a produit \$215,35, et qu'une balance de \$107,15 est due aux Demandeurs.

Les Défendeurs plaident que les Demandeurs ne pouvaient recouvrer: 1o. parceque la fleur prétendue vendue n'était pas un corps distinct d'autres quantités de même fleur parmi laquelle devait être prise celle vendue aux Défendeurs, qui ont acheté sur échantillon et sans même voir la fleur qu'on prétendait leur vendre; 2o. parcequ'il n'y a pas eu tradition, ni effective ni feinte de la dite fleur; 3o. parce qu'en supposant que les Demandeurs auraient un droit

d'action, ce ne serait que pour inexécution de contrat ; 4o. parce que les Demandeurs en recevant \$25 lors de la vente, avaient accepté cette somme comme une indemnité suffisante pour inexécution possible du contrat.

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Les Demandeurs prouvèrent par leur commis les faits allégués dans leur déclaration, et de plus que "dans le commerce de fleur, il se fait souvent des ventes de fleur livrable à une époque ultérieure, sans que la fleur vendue se trouve, au moment de la vente entre les mains des vendeurs. Quelque soient les variations du marché entre la vente et la livraison, le prix de vente est toujours maintenu. Il arrive aussi que malgré que la fleur vendue soit au moment de la vente, entre les mains du vendeur et à son magasin, la livraison n'est stipulée que pour une époque ultérieure. Dans l'un comme dans l'autre cas, c'est l'acheteur qui profite ou souffre des variations du marché."

Par un autre témoin, les Demandeurs établissent l'usage du commerce comme suit : "La fleur se vend sur échantillons, qui sont parfois envoyés par la poste et des ventes considérables se font ainsi sur l'examen d'échantillons et par correspondance, ce qui exclut la possibilité de la tradition. Du moment où le prix est convenu et la promesse réciproque de livrer et prendre respectivement est donnée, la vente est parfaite, et de ce moment les variations du marché sont aux pertes et profits de l'acheteur, quoique la marchandise reste en la possession du vendeur."

Per Curiam.—The question raised in this cause has long been settled both here and in England. Actual delivery is not necessary to give full effect to a contract of sale of flour.

The case of Gould and Binmore, Vol. VI. L. C. Jurist, p. 296, No. 1231, has been decided in accordance with that principle.

Judgment for Plaintiffs.

Doutre & Daoust, pour les Demandeurs.

Drummond & Bélanger, pour les Défendeurs.
(J. D.)

MONTREAL, 31 OCTOBRE 1862.

Coram BADGLEY, J.

No. 1514.

Roy et al., vs. *Turcotte*.

Jugé.—Que dans l'espèce, le débiteur est déchargé du paiement de la somme remise, par suite de la rétention par son créancier de billets souscrits par des tiers, et qu'il leur avait remis en paiement, quoique l'un de ces billets ne soit pas encore tout payé, et que les deux autres ne l'aient été que longtemps après leur échéance.

Les Demandeurs poursuivirent le Défendeur pour le recouvrement de la somme de \$188.16 pour balance restée due et échue au 27 septembre 1861, tant par compte courant que par billets.

Le Défendeur opposa à cette action une exception, par laquelle il prétendait qu'ayant réglé de compte avec eux le 22 juin 1860, il se trouvait ne leur devoir

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que \$496.56. Que se trouvant alors dans un état de gêne et de difficultés pécuniaires, il leur aurait proposé, ce qu'ils ont alors accepté, de leur payer cette somme au moyen de trois billets signés par des tiers, au montant de \$301.51 et de plus en argent \$72.40, faisant en tout \$373.91, équivalant à 15s. dans le £, en par eux le déchargeant du surplus; qu'en conformité à cet arrangement, il avait payé aux Demandeurs la dite somme et remis les trois billets en question, ainsi qu'ils l'ont reconnu par leur lettre du 13 juillet 1860, qui est comme suit:—"Nous avons reçu votre lettre avec son contenu, et à votre prochain voyage en ville nous réglerons cela."

Les Demandeurs répondirent spécialement à cette défense comme suit :

Que les dits Demandeurs n'ont jamais fait ni reconnu les prétendues conditions invoquées par le dit Défendeur en sa dite exception.

Que le 20 février 1860, le dit Défendeur se prétendant alors dans un état de gêne et de difficultés pécuniaires, aurait proposé aux Demandeurs, qui étaient alors ses créanciers, comme ils le sont encore du montant total réclamé du Défendeur en cette cause, de ne leur payer que 15 chelins courant dans le louis, en par lui leur fournissant une hypothèque sur une propriété ou leur donnant une bonne caution, et ce sous le délai d'un mois à compter du dit jour 20 février 1860.

Que le dit Défendeur, malgré cette proposition par lui ainsi faite, a toujours négligé de s'y conformer et de remplir aucun de ses engagements, et n'a jamais fourni aux Demandeurs ni hypothèques ni caution quelconque.

Que le ou vers le vingt-huit juin mil huit cent soixante, les dits Demandeurs étant créanciers de toute la totalité de leur créance par eux réclamée du Défendeur en cette cause, n'ont reçu les trois billets consentis et signés par Messire Barrette, J. B. Tellier dit Lafontaine et M. S. Boulet que comme sûreté collatérale et dont le produit ne serait placé à l'avoir du Défendeur qu'à fur et à mesure que tels billets seraient payés.

Que le billet du dit J. B. Tellier dit Lafontaine n'est pas encore payé en entier, et qu'il reste dû sur icelui une balance de vingt-sept dollars avec tous les intérêts à calculer jusqu'au parfait paiement, ainsi qu'il appert au dit billet produit avec les présentes.

Que tantant le dit Défendeur n'a jamais exécuté la proposition par lui faite et ci-dessus expliquée, et ne s'y est jamais conformé, et est ainsi resté le débiteur des dits Demandeurs, qui ne lui ont jamais fait remise d'aucune partie de leur dite créance.

Que le dit Défendeur n'a jamais payé ponctuellement ce qu'il devait aux Demandeurs, et n'a acquis aucun droit à une remise du surplus de la dite dette en aucune façon ni par suite d'aucune cause légale, attendu que la proposition du dit Défendeur n'a jamais reçu aucune exécution légale.

Par la preuve, il appert que la balance restée due sur le billet de Tellier est encore de \$27.40, suivant la déposition du témoin Gélinas, et par leur état de compte les Demandeurs, dans leurs réponses sur faits et articles, prétendaient que le Défendeur leur redevait encore une balance de \$37.42, comme suit, savoir :

Montant de l'attermolement,.....	\$373.92
Reçu le montant du billet de M. Barrette,.....	\$95.18
Do de M. Boulet,.....	67.00
Accompte de celui de M. Tellier,.....	45.00
Par argent du Défendeur, le 25 juin 1860,.....	89.32
Do Do le 13 juillet 1860,.....	40.00
	336.50
Balance due,.....	\$37.42

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L'un des Demandeurs, Dufort, dans sa déposition, admit qu'il lui avait été donné par le Défendeur, en Février 1860, un bonus de \$20 pour des intérêts.

Le témoin Gélinais dépose que les trois billets en question n'ont été reçus par les Demandeurs que comme sûreté collatérale, et que ceux de ces billets qui ont été payés, ne l'ont été que longtemps après leur échéance; et que l'arrangement proposé par le Défendeur, en février 1860, n'avait pas eu de suite, vu que le Défendeur ne s'y était pas conformé, et que ce n'était qu'en juillet suivant que le Défendeur avait transmis les trois billets en question dont il avait garanti le paiement.

Le Défendeur n'examina aucun témoin. A l'audition les Demandeurs citèrent à l'appui de leur prétentions les autorités suivantes :

10. Le principe général est que le débiteur ne doit pas profiter de la remise du créancier, s'il n'a pas payé dans les délais stipulés. *Vide* 1 Revue Lég., p. 110, *Atkinson vs Nesbitt*, et p. 33, *Beaudry vs. Bareille*.

20. Le même principe est consacré dans la cause de *Boudreau vs. Damour*; car l'exception qui y est reconnue prouve la règle, savoir : cette exception consiste en ce que les créanciers avaient donné délai aux faiseurs des billets. *Vide* 3 L. C. Jurist, p. 124.

30. Il a été jugé que dans le cas même où le créancier s'est démenti de ses titres de créance, n'étant pas une preuve de l'intention du créancier de décharger son débiteur absolument; il peut poursuivre son débiteur pour la remise qu'il lui avait faite. *Vide* 5 L. C. Report, p. 41, *Brown et al., vs. Hartigan*.

13 Guyot, Vo. peine contractuelle.

40. La novation ne se présument pas, il résulte que des billets donnés par le débiteur n'opèrent aucune novation s'ils ne sont pas payés à leur échéance, car ils sont subordonnés à la condition de l'encaissement, et ne sont considérés que comme "collateral security." *Vide* Poth. Oblig., No. 594.

Troplong, Privilèges et hypothèques, No. 199.

50. It has been invariably held that the taking of a promissory note, &c., is considered to be received subject to the condition of payment, subordonnés à la condition de l'encaissement. *Vide* 1 L. C. Report, p. 250, *Macfarlane vs. Patton*, and the authorities cited by Mr. Dunkin on page 252, note (1)

BADGLEY, J.—This is an action by the late firm of Roy & Dufort for \$188.16 for balance of account to the 27th September, 1861. The Defendant sets up a composition agreed upon by them under the following circumstances :

In June, 1860, his balance was \$498.56, he offered to settle by three notes and a sum of money amounting altogether to \$373.90, equal to 15s. in the £,

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the Defendant produces a rough statement shewing these figures. On the 28th June, 1860, he pays them in cash \$89.32 as *per* their receipts and receives back from them the three notes referred to, to return them altered according to their wishes, to meet the conditions agreed between them. The Defendant's letter enclosing the notes is dated the 12th July, 1860, and is as follows :

..... J'ai fait mon possible pour avoir ces trois billets à courte échéance, ... mais à leur échéance je vous garanti qu'ils seront payés en plein..... Si vous n'acceptez pas ces billets, ayez la bonté de me les renvoyer par la malle, et si vous les prenez, comme je l'espère, ayez la bonté de m'envoyer un reçu de tout compte pour argent et billets jusqu'à ce jour.

On the 13th July, 1860, the Plaintiffs acknowledged his letter as follows :—

" Nous avons reçu votre lettre avec son contenu, et à votre prochain voyage " en ville nous réglerons cela." And they retained the notes.

The amount of these notes with the cash paid in June amount to \$323.68, to which adding, says the Defendant, \$50 paid by Melançon to Plaintiffs on his behalf, would make up within a few cents the said sum of \$373.90, being the amount of the composition stated in the rough statement.

The account produced by the Plaintiffs shews the payment in June of \$89.32 and on the 13th July \$40 instead of \$50. Dufort's answers on *faits et articles* shew this statement, making up the \$373.90.

The deposition of Dufort, one of the Plaintiffs, admits that \$20 was paid for which no credit was given. This sum more than completes the amount which Defendant was to pay and which the Plaintiffs agreed to receive from him in full.

After the payments of these sums and the receipts of the notes, forming together the actual amount of \$373, which they agreed to take from him, being 15s. in the £ in full, they turn upon him and claim the balance.

This is not a question of law ; it is one of fact and of justice, and both justice and equity are in favour of the Defendant's good faith. He requested them to return the notes of his friends if they were not satisfactory, they never intimated to him that they had gone back from their agreement or only received the notes and cash on account, but left him in the belief that they would act by him with the same good faith that he had perfected his agreement. Looking with care as a commercial jury would do, I think the rights are with the Defendant, and the action is dismissed with costs.

Lafrenaye & Armstrong, Attorneys for Plaintiffs.

Dorion & Sénécal, Attorneys for Defendant.

(P.R.L.)

PRIVY COUNCIL.

3RD DECEMBER, 1862.

Present LORD CHELMSFORD, LORD KINGSDOWN, AND SIR J. T. COLERIDGE.
The Beacon Fire and Life Insurance Company

vs.

Gibb and others.

**MARINE INSURANCE—FORM OF POLICY—HOUSE POLICY—CONDITIONS—
 APPLICABILITY—CONSTRUCTION.**

In an action on a Policy of Insurance against fire, entered into by the appellants as the insurers, and the respondents as the insured, in respect of a Steam vessel, described as plying between Quebec and the Upper Lakes, it appeared that a form of Policy had been used which was properly applicable to insurance of houses or buildings; and, amongst other conditions endorsed on the policy was one, "that if more than 20 lbs. weight of gunpowder should be on the premises at the time when any loss happened, such loss should not be made good." The ship was destroyed by fire during the continuance of the policy. It was usual for these steamers to carry gunpowder as freight; and at the time the vessel was destroyed there was 100 lbs. weight of gunpowder on board:—HELD that the word "Premises" though in popular language applied to buildings, yet in legal language meant the subject or thing previously expressed; and that the question being, not what was the intention of the parties, but what is the meaning of the words they have used, the reasonable construction of the contract was, that the vessel should not carry more than 20 lbs. weight of gunpowder.

This was an appeal from a judgment of the Court of Queen's Bench of Lower Canada reversing a judgment of the Superior Court. The respondents were the owners of a Steam-Ship called the *Tinto*, which used to ply with passengers and freight between Quebec and the Upper Lakes of Canada. The appellants were a corporation carrying on business as insurers at Quebec. The owners of the *Tinto* insured her against loss or damage by fire to the extent of 1000*l.* currency, by a policy of insurance made with the appellants, dated the 29th April, 1856. The policy was upon "hull, tackle, apparel, and other articles of outfit, including boats, furniture, linen, plate, glass, and earthen ware, engine and machinery of the steam propeller, *Tinto*, now lying at Sorel, to ply between Quebec and the Upper Lakes," and contained the following proviso:—"Provided always, that this policy, and the insurance hereby made, shall be subject to the several conditions and regulations herein and hereon expressed, so far as the same are or shall be, applicable, in the same manner as if the same respectively were repeated and incorporated in this policy." The seventh condition endorsed on the policy was in part as follows:—"The company is not responsible for, or liable to pay, any loss or damage occasioned by or through any explosion; and if more than 20 lbs. weight of gunpowder shall be on the premises at the time when any loss happens, such loss will not be made good. The use of gas lights is allowed, provided the gas is not made on the premises; but this company will not be responsible for any loss or damage occasioned by or through the use of camphone." The *Tinto*, whilst on her voyage from Quebec and whilst covered by the policy, was, on the 17th July, 1856, destroyed by fire. The respondents sued the appellants in the Superior Court for the sum insured in the policy. The questions of fact to be submitted to the jury having been settled by the judge in accordance with the

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practice of the Court, the case came on for trial before the judge and a special jury. The execution of the policy and the loss of The Tinto by fire, having been duly proved, evidence was tendered by the respondents to prove that it was the custom and usual practice amongst freight boats of the same kind, and on the same line as The Tinto, to carry gunpowder on freight, and that this custom and practice was well known at Quebec, with the view to show that the said clause in the seventh condition, endorsed on the policy, was not applicable to the insurance of such a vessel. It was admitted that the gunpowder had nothing to do with the destruction of the boat, and that the destruction would have occurred and would have been as complete had there been no gunpowder on board. The jury, by their answers to the questions of fact submitted to them, found that the policy had been executed; that The Tinto had been destroyed by fire whilst covered by it; and that satisfactory proof of the loss had been made to an amount exceeding the sum insured. The third question submitted to the jury, was as follows:—"At the time the said steamer Tinto was so consumed by fire, was there any quantity of gunpowder on board the said steamer, and if so, what weight or quantity? To this the jury answered, "Yes, we find that a package containing about 100 lbs. of gunpowder was on board as freight and which the owners of the said steamer were not precluded by their policy from carrying." Upon this finding, the Superior Court struck out, upon the motion of the appellants so much of the finding of the jury in answer to the third question as stated, that the respondents were not precluded by their policy from carrying the gunpowder, and gave judgment on the merits for the appellants. This judgment was, on appeal to the Court of Queen's Bench of Lower Canada, reversed, and judgment was entered for the respondents. Against this judgment the appellants appealed to her Majesty in Council.

Manisty, Q. C., and J. Brown, for the Appellants:—The seventh condition of the policy absolutely exempts the company from making good any loss, in case more than 20 lbs. weight of gunpowder should be on the premises insured at the time when any loss should happen; and the jury found that there was more than 20 lbs. weight of gunpowder on board of the steamer at the time of the loss. The construction of the policy is a question of law for the Court, and not a question of fact for the jury. The finding of the jury, that the owners of the steamer were not precluded by their policy from carrying more than 20 lbs. weight of gunpowder was *ultra vires*, and mere surplusage.

On the facts found by the jury the appellants are entitled to judgment.

The *Solicitor General* (*Sir R. Palmer, Q. C.*) and *Charles Pollock* for the respondents:

The respondents are entitled to judgment against the appellants for the amount of the loss occasioned by the fire. The clause on the seventh condition is not applicable to the vessel insured, and therefore ought not to be taken as incorporated in the terms of the policy. The policy of insurance, being a "contract aléatoire," must according to the law which prevails in Lower Canada be carried out in good faith; and there is no plea and no evidence of bad faith, concealment, fraud, or negligence, on the part of the insured. The mere fact that 100 lbs. of gunpowder was on board the vessel, such gunpowder

having in no way led to or increased the loss, was not as material a circumstance as, in the absence of bad faith, concealment, fraud, or negligence, rendered it just that the insured should lose their insurance. The carrying of gunpowder on freight by the vessel was a necessary and usual part of her trade, and known so to be by the appellants at the time of effecting the policy; and the jury find that the owners were not precluded by their policy from carrying it.

The following authorities were referred to:—*Anderson vs. Fitzgerald* (4 H. L. C. 484); *McEwan vs. Cuthridge* (13 Moo. P. C. 304); *Rickman vs. Carstairs* (5 B. & Ad. 663); *Pothier* (Dupin's ed.), *Traité du Contrat d'Assurance*, vol. 4; *Arnould*, on Marine Insurance, 2nd ed.; *Casey vs. The Mutual Insurance Company* (4 Lower Can. Rep. 107); and *Soupras vs. The Mutual Fire Insurance Company* (1 Lower Can. Jur. 197).

Lord CHELMSFORD delivered the judgment of their Lordships: This is an action upon a renewable time policy of insurance against fire, made by the appellants, The Beacon Life and Fire Insurance Company, of Lower Canada, upon the respondents' steam vessel *Tinto*, described in the policy as "lying at Sorel to ply between Quebec and the Upper Lakes;" and the only question which arises in the case is, whether part of one of the conditions endorsed upon the policy enters into the contract between the parties.

Now the whole difficulty in this case—if really there is any difficulty—has arisen from the company taking a form of policy for insurance upon houses and buildings, and not striking out those conditions endorsed on the policy which were inapplicable to the subject matter insured, but leaving the question of the application of the conditions to the proviso in the body of the policy to the effect—"that this policy and the insurance hereby made shall be subject to the several conditions and regulations herein and hereon expressed, so far as the same are or shall be applicable." During the continuance of the policy, the steamer was entirely destroyed by fire, and the present action was brought against the company to recover the amount of the insurance. The declaration, it has been observed, negatives the fire having been brought within any of the exceptions which are contained in part of the seventh condition, thereby admitting that part, at least, of the condition enters into the insurance.

The company pleaded, amongst other pleas, that the policy of insurance in the declaration mentioned was made by the defendants under and subject to certain conditions and regulations therein and thereon expressed; and, among other things, that if more than 20 lbs. weight of gunpowder should be on the premises at the time when any loss happened, such loss would not be made good. And the plea averred, that at the time *The Tinto* was destroyed by fire there was on board the vessel a larger quantity of gunpowder than 20 lbs. weight.

The parties being at issue by the provisions of the provincial statute, the questions to be submitted to the jury were determined by the Court; and one of those questions—the only one necessary to be considered—is the third, viz., at the time the said steamer *Tinto* was so consumed by fire, was there any quantity of gunpowder on board the said steamer, and, if so, what weight or

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Upon the trial, that question, with the others was submitted to the jury, and they returned for answer, "Yes, we find that a package containing about 100 lbs. of gunpowder was on board as freight, and which the owners of said steamer were not precluded by their policy from carrying."

It is quite clear—it is admitted, indeed, by all the judges, and there can be no question about it—that the latter words of this finding, "and which the owners of the steamer, were not precluded by their policy from carrying," were beyond the province of the jury. It was taking upon them to decide upon the construction of the contract. I suppose that the course in the province in these cases, where the jury are required by the provincial statute to find a special verdict—that is, not a special verdict as the term is understood in this country, but to answer distinctly to the different questions which are settled by the Court to be proper to be submitted to them, is, that an application is afterwards made to the Court to apply the verdict. Accordingly, such an application was made by the Defendants in the action; and, in addition, there was a motion to strike out the words to which I have referred in the finding of the jury. There was, perhaps, no necessity for this motion, as the latter part of the finding of the jury might have been treated as mere surplusage; but the Superior Court took it into consideration and decided that the words ought to be struck out from the answer of the jury, and then gave judgment for the Defendants.

From this judgment there was an appeal to the Court of Queen's Bench, and after argument the Court was divided, three judges being in favor of the Respondents, and two in favor of the Appellants. The judgment being also in favor of the Appellants, there has been an equality of opinion amongst the judges who have had to decide the question in the Courts of the province. Two of the Judges, the Chief Justice and Judge Mondelet, who were in favor of the Respondents, were of opinion that the word "premises" was applicable, in the seventh condition, to the case of a steamer, but their decision proceeded on the ground that a policy of insurance was a *contrat aléatoire*, which must be carried out in good faith, and that the company could not be relieved from their responsibility to answer for the loss without proof of deception and fraud, and a further proof that the fire had extended by reason of more than the limited quantity of gunpowder being on board. There was not the slightest ground for suggesting any deception or fraud on the part of the company; and as to its being necessary to give proof that the fire had extended by reason of a breach of the condition, this seems to introduce into the contract an entirely new term. It is important to observe, that in this very seventh condition there are instances in which the company have expressly stipulated that they shall not be liable for any loss or damage which has been occasioned by or through certain circumstances, as explosion in one case, and the use of camphine in another; thereby distinguishing in terms between those cases where the loss must be brought home to the specified cause, or to the use of the prohibited article, and the case in question of their not being answerable were there more than 20 lbs. weight of gunpowder on board; whether it has occasioned the loss or not. Badgley, J., in part of his judgment, seems to think that the condition is not applicable at all to the case of a steamer; but at the close of it he takes a

different view, and says the contract may be fairly read as follows :—" We will insure your freight steamer ; we know that gunpowder is an article of freight and transportation in steamers ; but if you keep on board for use more than 20 lbs., and the vessel take fire, we shall not be responsible for the loss." Here, again, the contract is construed against the company by the introduction of words which entirely change its meaning and effect, and an absolute prohibition against having more than a certain quantity of gunpowder on board is rendered inapplicable by inserting the words "for use" into the condition. In the argument before their Lordships, it has been contended on the part of the Respondents that, from the use of the word "premises," the parties could not have intended that the part of the seventh condition in question should apply to the steamer insured ; and that there were extrinsic circumstances to shew that it could not have been in the contemplation of the parties that the word "premises" should be so understood. In order to construe a term in a written instrument where it is used in a peculiar sense, different from its ordinary meaning, evidence is admissible to prove the peculiar sense in which the parties understood the word, but it is not admissible to contradict or vary what is plain. Now the word "premises" although in popular language it is applied to buildings, in legal language means "a subject or thing previously expressed" ; and the question here is, in what sense this word is used, which must be gathered from the contract itself, and not from any external evidence. As Lord Denman says, in a case of *Rickman vs. Carstairs* (5 B. and Ad. 663), "The question in this and other cases of construction of written instruments is, not what was the intention of the parties, but what is the meaning of the words they have used." Supposing, however, that evidence was admissible in this case for the purpose of proving that, by the use of the word "premises," the parties did not intend to include the steamer, the subject matter of the insurance, what is relied upon appears to be entirely insufficient to render the condition inapplicable. It is said that this insurance was upon a trading steamer ; that it was the usage of steamers of this description to carry gunpowder on freight ; that this was known to the company, and therefore, it must be taken that they did not mean to include this portion of the seventh condition in the insurance. But assume that it was notorious to the company that it was the usage of a steamer of this description to carry gunpowder upon freight, why should they not, for that very reason, desire to limit their risk by preventing more than 20 lbs. of such a hazardous article being carried at any one time ? If the condition is not to be considered part of the contract, this strange consequence will follow : that it being clear to the parties insured that the company desire to guard themselves in the case of houses and buildings from the hazard of there being upon the premises at any one time more than a limited quantity of gunpowder, and having excluded gunpowder altogether from those hazardous risks for which an additional premium is to be paid, the conditions stating that gunpowder under no circumstances is to be insured, this steamer might, during the whole continuance of the policy, carry backwards and forwards cargoes of gunpowder, the company receiving no premium for the additional risk incurred ; and in case of the vessel taking fire and being

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burnt, though not originally by an explosion, but of course the gunpowder contributed materially to extend the fire, the company would be answerable for the loss. The question then is, whether assuming under these circumstances that it was more probable that the prohibition with regard to the amount of gunpowder should be included in the contract between the parties than not, the word "premises" must not receive a reasonable construction, which would make it apply to this particular contract. Now it is quite clear that the popular sense of the word is excluded, because there are no buildings to be insured. Then it only remains to give it that meaning which the reasonable construction of the contract requires. Mondelet, J; says, that "The form of the policy is one which should not have been made use of relative to a steamer; but inasmuch as this policy, though improper, has been accepted by the insured, and they must be taken to have read it, since they have signed it, it is right and just that the word 'premises' should be interpreted against them, and adjudged to refer between the parties to the steamer, which was the object, the sole object, insured."

If, then, this condition is applicable to the subject insured, the only question which arises upon it, is, whether the facts bring the case within the condition upon which the finding of the jury, that there was at the time of the fire more than 20 lbs., weight of gunpowder on board, is conclusive. Under these circumstances, it is quite immaterial whether the fire was or was not occasioned by more than the specified quantity being on board.

The parties have agreed to this as a condition in the policy, and the cases which have been adverted to, of the effect of deviation upon marine insurances, are good illustrations of the way in which parties are bound by contracts of this description. It is familiar law that a wilful deviation, although the loss is not occasioned by, or attributable to it, exonerates the underwriters from liability. So, again, take a life policy. We know that in England, these policies invariably contain a stipulation that the insured is not to go beyond the limits of Europe.

Now, if the party insured goes, even for an instant, out of Europe, though without the least injury to his health, this condition of the policy attaches, and the policy becomes void. This being so, all that remains for their Lordships to say on the present occasion, is, that it being admitted that this condition is applicable to the case of the steamer, the subject insured, and it having been found that the condition has been broken, the judgment of the Superior Court was a correct judgment, and the judgment of the Court of Queen's Bench reversing that judgement, cannot be supported. They will, therefore, recommend to her Majesty that the judgment of the Court of Queen's Bench be reversed, and the judgment of the Superior Court be affirmed; and that the respondents should pay the costs in the Queen's Bench and also the costs of this Appeal.

Judgment reversed.

Manisty, Q. C., J. Brown, for Appellants.

Sir R. Palmer, Q.C., Solicitor General, and Charles Pollock, for Respondents.
(W. H. N.)

COUR SUPÉRIEURE.

ARTHABASKA, 20 MARS, 1863.

Coram STUART, J.

No. 298.

Béliveau, Requérant un Bref de Quo warranto.

vs.

Juneau,

Défendeur.

Jugé:—Qu'il suffit pour réponse à une requête libellée, demandant à une personne accusée d'occuper et de remplir illégalement et sans droit les devoirs de conseiller municipal, de produire son mandat; sur le renvoi de la défense en droit, en Juin 1862.

Jugé:—Qu'il ne suffit pas à une personne accusée d'occuper et de remplir illégalement et sans droit les devoirs de conseiller municipal de produire son mandat, mais elle est obligée de prouver que l'élection, en vertu de laquelle elle a été élue à telle charge, a été faite suivant la loi.

Le Requérant, qui est cultivateur, demeurant dans la paroisse de St. Norbert d'Arthabaska, s'était adressé à l'honorable Juge Stuart, à Québec, et lui exposait par sa requête libellée, du 1er mai 1862, ce qui suit :

"Votre pétitionnaire est maintenant et a été, depuis plus de deux années, voteur et électeur, qualifié à voter, pour les charges de conseillers municipaux pour la municipalité de la paroisse de St. Norbert d'Arthabaska, et qu'il y a, et avait payé toutes cotisations ou taxes locales, par lui dues, lors de la dernière élection des conseillers municipaux pour la dite municipalité, tant celles imposées pour les fins municipales que pour les frais d'éducation.

Que Pierre Juneau, de la paroisse de St. Norbert d'Arthabaska susdite, cultivateur, a usurpé et usurpe et s'est emparé illégalement de la charge de conseiller local, de la municipalité locale, de la paroisse de St. Norbert d'Arthabaska, et qu'il s'institue comme tel, conseiller, et sous ce titre, exerce les droits et privilèges appartenants à un conseiller local, de la dite municipalité de la paroisse de St. Norbert d'Arthabaska.

Que le dit Pierre Juneau, après avoir prêté le serment de conseiller de la dite municipalité, s'est emparé de la dite charge ou affaire, et a usurpé et a pris part aux délibérations du conseil municipal de la dite municipalité et a participé à la passation des règlements et résolutions adoptées par le dit conseil, lors de ses réunions tenues, depuis le 13 janvier dernier jusqu'à ce jour, et qu'il continue à usurper et remplir illégalement, la dite charge de conseiller comme susdit et à occuper le siège de conseiller dans le dit conseil, qu'il usurpe injustement comme susdit :

Que le dit Pierre Juneau a, depuis le 13 janvier dernier, et à diverses reprises, jusqu'à ce jour, rempli la charge de conseiller et agi comme tel, et ce illégalement et contrairement à la loi.

Que par suite de ce que dessus le dit Pierre Juneau usurpe et s'empare illégalement et sans droit quelconque de la charge de conseiller municipal pour la dite municipalité locale de la paroisse de St. Norbert d'Arthabaska, et qu'il n'a jamais eu aucun droit à la dite charge, ni au titre de conseiller municipal qu'il a usurpé, et dont il s'est emparé illégalement comme susdit :

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Pourquoi votre Requérant demande qu'il émane un Bref, commandant au dit Pierre Juneau, d'être et de comparaitre, le dixième jour de mai courant, devant un des honorables Juges de la Cour Supérieure pour le Bas-Canada, siégeant à Arthabaskaville, dans la dite paroisse de St. Christophe, au palais de justice, en la chambre des juges, pour répondre à la présente requête libellée et démontrer et prouver l'autorité en vertu de laquelle, lui, le dit Pierre Juneau, s'est permis d'occuper et exercer la dite charge et franchise de conseiller local de la dite municipalité de la paroisse de St. Norbert d'Arthabaska, et qu'il plaise à l'un de vos honneurs de déclarer que le dit Pierre Juneau n'a aucun droit d'exercer la dite charge de conseiller de la dite municipalité locale de la paroisse de St. Norbert d'Arthabaska, et que par le jugement à intervenir, le dit Pierre Juneau soit déclaré coupable d'avoir usurpé, et de s'être emparé illégalement de la dite charge de conseiller municipal de la dite municipalité locale de la paroisse de St. Norbert d'Arthabaska, et qu'il soit exclu et dépossédé de la dite charge, le tout avec dépens, distraits en faveur du procureur soussigné, le dit Requérant se réservant le droit de prendre telles conclusions ultérieures qu'il avisera."

(Signé,)

L. G. HOULE,

Proc. Requérant.

Arthabaskaville, 1er mai 1862.

A cette requête libellée le Défendeur opposa les défenses suivantes :

" 1o. Que le dit Défendeur réside, depuis plusieurs années, dans les limites, de la municipalité de la paroisse de St. Norbert d'Arthabaska, et qu'il y demeure encore ; qu'il y possède, depuis plusieurs années jusqu'à ce jour, comme propriétaire, en son propre nom, un bien fonds, tenu en franc et commun soccage, dans les limites de la municipalité de la paroisse de St. Norbert d'Arthabaska, de la valeur de quatre cent piastres ; qu'il est âgé de vingt-et-un an accomplis, sujet de sa Majesté par naissance ; enfin, bien et dûment qualifié d'après la loi, à être choisi par les habitants de la dite municipalité et à être élu conseiller municipal de la dite municipalité de la paroisse de St. Norbert d'Arthabaska, et que le dit Défendeur est ainsi qualifié à être élu conseiller municipal, comme susdit, depuis plusieurs années, et qu'il l'est encore.

" 2o. Que le dit Défendeur en cette cause a été notifié par Charles Adrien Pacaud, écuyer, président de l'élection, qui a eu lieu le 13 janvier, pour l'élection de sept conseillers municipaux, pour la municipalité de la paroisse de St. Norbert d'Arthabaska, qu'il avait été dûment élu, le dit jour, conseiller municipal pour la dite municipalité de la paroisse de St. Norbert d'Arthabaska, ainsi qu'il appert au dit avis ici produit comme faisant partie des présentes, et que le dit Charles Adrien Pacaud était bien et dûment autorisé à présider la dite élection.

" 3o. Que le Défendeur n'était pas exempté par la loi d'accepter cette charge et d'en remplir les devoirs, mais qu'il a été obligé d'en remplir les devoirs depuis le 13 janvier dernier, pour ne pas encourir et payer la pénalité de vingt piastres mentionnées dans l'acte municipal du Bas-Canada de 1860, et que la dite élection municipale n'a pas été déclarée nulle et illégale par la Cour de Circuit, dans et pour le district d'Arthabaska, quoique depuis le dit mois de

janvier dernier, il a été tenu un terme de la dite Cour, savoir : depuis le sept au douze de mars dernier, et qu'aucun des intéressés, à la dite élection municipale, ne s'en soit plaint à la dite Cour."

Le Requérent demanda le débouté de cette défense par une défense au fonds en droit, basée sur les raisons de droit suivantes :

" 1o. Parce que le dit Défendeur n'allègue pas dans son plaidoyer qu'il a été élu conseiller municipal pour la municipalité de la paroisse de St. Norbert d'Arthabaska, à une assemblée publique d'habitants habiles à voter, et qu'il se borne à dire qu'il a été notifié, par Charles Adrien Pacaud, écuyer, qu'il avait été dûment élu, ce qui ne lui donne aucun droit à la dite charge.

" 2o. Parce qu'il ne dit pas dans son plaidoyer, qu'avis public d'une assemblée quelconque ait été donné, par le maire, ou à son défaut, par le secrétaire-trésorier, ou que sans avis, une assemblée publique ait eu lieu pour l'élection de conseillers.

" 3o. Parce qu'il ne dit pas non plus, qu'il ait été nommé conseiller, par le gouverneur ni par aucun conseil quelconque, en remplacement d'un autre conseiller.

" 4o. Parce qu'il ne dit pas, qu'il ait été choisi d'une manière ou d'une autre, comme conseiller par les habitants de la municipalité locale de la paroisse de St. Norbert d'Arthabaska.

" 5o. Parce qu'il ne dit pas, s'il a été élu à l'unanimité ou à la pluralité des voix par les électeurs habiles à voter.

" 6o. Parce qu'il ne dit pas, s'il y a eu plus de sept candidats à son élection, et si elle a été contestée par plus de trois électeurs habiles à voter.

" 7o. Parce qu'il ne dit pas, qu'il ait été déclaré ou proclamé dûment élu conseiller dans un temps ou dans un autre.

" 8o. Parce que le dit Défendeur ne dit pas, qu'il ait prêté le serment d'office comme conseiller d'une municipalité quelconque, et se contente d'admettre qu'il a agi comme tel, d'après l'avis que lui a donné Charles Adrien Pacaud, Ecr.

" 9o. Parce que l'avis donné par Charles Adrien Pacaud, et annexé au plaidoyer du Défendeur, n'est pas une raison suffisante pour faire agir une personne comme conseiller.

" 10. Parce que le dit plaidoyer du Défendeur n'est pas une réponse légale à la requête libellée du Requérent.

" 11o. Parce que les conclusions du dit plaidoyer ne découlent pas des prémisses, et que ce n'est que par le concours de toutes les raisons ci-haut énumérées et des conditions susdites, que le dit Défendeur aurait un titre à la charge de conseiller.

" 12o. Parce qu'il ne dit pas non plus de qui le dit Charles Adrien Pacaud, qui lui a donné l'avis annexé au dit plaidoyer, tenait son autorité."

Cette défense en droit fut déboutée avec dépens.

Per Curiam.—Le Défendeur n'est pas obligé, dans sa défense, d'aller au delà de la demande du Requérent ; il désire savoir en vertu de quelle autorité le Défendeur agit : ce dernier la lui a indiquée, il doit être satisfait. Il n'a pas le droit d'exiger du Défendeur plus qu'il ne demande par sa requête libellée.

Talbot,
vs.
Luneau.

Les parties procédèrent à la preuve; le Requérent prouva qu'il était électeur et qu'il avait le droit comme tel de faire la requête libellée; le Défendeur prouva qu'il était bien et dûment qualifié à être élu conseiller; que le président de l'assemblée lui avait notifié qu'il avait été bien et dûment élu, et que le rapport de cette élection avait été signé et fait au secrétaire-trésorier du conseil du comté.

Per Curiam.—Le Défendeur en cette cause a prouvé qu'il avait été élu, et que lors de l'élection il était qualifié à être élu, mais il a omis de prouver que l'élection avait été faite suivant la loi. *L'onus probandi* pesait sur lui et non pas sur le Requérent. Un conseiller ne doit pas s'immiscer dans l'exercice de sa charge, sans avoir, au préalable, acquis la certitude que son élection avait été faite suivant la loi, et que toutes les formalités voulues par la loi aient été bien et dûment observées. Le Défendeur a agi de bonne foi. Il ne peut être condamné à payer l'amende, mais il doit payer les frais.

Le jugement de la Cour est comme suit :

"Considering that the Plaintiff hath sufficiently proved the allegations of his petition: that the said Pierre Juneau hath wholly failed to show that he was legally possessed of the office of Councillor of the Municipality of the Parish of St. Norbert d'Arthabaska in the manner by him alledged. The Court doth dispossess, put out, and remove the said Pierre Juneau from the said office of Councillor of the municipality of the Parish of St. Norbert d'Arthabaska, and the Court doth adjudge and condemn the said Pierre Juneau to pay costs."

L. G. Houle, Proc. Requérent.

G. Leclère & G. Talbot, Conseils.

E. L. Pacaud, Proc. Défendeur.

Wm. Duval, Conseil.

(R.L.F.)

DISTRICT D'ARTHABASKA.

ARTHABASKA, 14 MAI, 1862.

Coram STUART, J.

No. 297.

Talbot,

Requérent un Bref de Quo warranto.

vs.

Luneau, fils Défendeur.

Jugé: Qu'un juge de la Cour Supérieure pour le Bas-Canada peut agir, comme juge, simultanément pour tous les Districts du Bas-Canada.

Le Requérent, en cette affaire, avait présenté (accompagnée d'affidavits) une Requête libellée, datée "Arthabaskaville, 1^{er} Mai, 1862," pour obtenir l'émanation d'un Bref de *Quo warranto* contre le Défendeur, qu'il accusait d'occuper illégalement la charge de conseiller de la municipalité de la paroisse d'Arthabaska.

Talbot,
vs.
Pacaud.

La requête était adressée comme suit : " District d'Arthabaska, Cour Supérieure, en vacance."

A aucun des Honorables Juges de la Cour Supérieure pour le Bas-Canada, siégeant à St. Christophe d'Arthabaska, dans et pour le District d'Arthabaska et ayant juridiction pour le dit District.

Le juge ordonna l'émanation du Bref de *Quo warranto* le 2 Mai, 1862.

A cette Requête libellée le Défendeur plaida une exception à la forme :

1o. Que le dit Bref a été émané illégalement, irrégulièrement et sans aucun ordre de cette Cour ni d'un juge d'icelle.

2o. Qu'il n'appert point par le Bref de Sommation en cette cause que le dit Bref ait été émané sur l'ordre de cette Cour, ou d'un juge d'icelle, dans et pour le District d'Arthabaska.

3o. Parceque l'ordre de l'Hon : Andrew Stuart, ordonnant l'émanation du Bref en cette cause, et qui se trouve au bas de la Requête libellée en cette cause, a été fait et signé par le dit Juge en la Cité de Québec, en dehors des limites du District d'Arthabaska, et que le dit Honorable Andrew Stuart n'avait pas là et alors le droit d'instrumenter comme Juge de la Cour Supérieure pour le Bas-Canada, pour le District d'Arthabaska : étant là et alors en dehors de la juridiction de la dite Cour pour le District d'Arthabaska. Le Requéérant fit l'admission par écrit, que de fait l'ordre du juge avait été donné à Québec.

Per Curiam : Les Juges de la Cour Supérieure ont une juridiction sur tous les Districts du Bas-Canada, et peuvent simultanément en remplir tous les devoirs, autorité et juridiction, quoiqu'en dehors des limites du District pour lequel ils exercent leur autorité, et étant à Québec, un juge de la Cour Supérieure peut faire des actes judiciaires pour Montréal ou Gaspé comme si là et vers il était dans une de ces deux places.

Exception à la forme déboutée sans dépens.

Charles Leclère, Ecuyer, Proc. du Requéérant.

Talbot et L. G. Houle, Conseils.

William D. val, Ecuyer, Proc. du Défendeur.

E. L. Pacaud, Conseil.

N. B.—Mêmes décisions dans les causes : No. 296 David Talbot et A. Pacaud.
No. 298 Jean Bte. Béliveau et Pierre Juneau.
E. L. P.

ARTHABASKA, 20 MAI, 1863.

Coram STUART J.

No. 298.

Talbot.

Requéérant un bref de *Quo-warranto*.

vs.

Pacaud, Défendeur.

Jugé : Que le Maire auquel on conteste le droit d'agir comme Maire, ne doit pas prouver seulement qu'il a été élu Maire et qu'il est encore Maire bien et dûment élu, qu'il n'a pas été remplacé qu'un autre Maire n'a pas été nommé à sa place, mais il doit prouver en outre que son élection comme conseiller a été faite suivant la loi.

Le Requéérant, qui réside dans la paroisse de St. Norbert d'Arthabaska, avait présenté une Requête libellée, dans cette cause, à l'Honorable Juge Stuart, à

Talbot,
vs.
Pacaud.

Québec, pour obtenir de la Cour Supérieure de ce District, l'émanation d'un bref de *quo-warranto*, pour obliger le Défendeur d'être et de comparaître le dixième jour de mai, 1862, devant un des Honorables Juges de la Cour Supérieure du Bas-Canada, siégeant à Arthabaska, en la paroisse de St. Norbert d'Arthabaska, dans le palais de justice, en la chambre des juges, pour répondre à la requête libellée et montrer et prouver l'autorité en vertu de laquelle il s'est permis d'occuper et d'exercer la dite charge de Maire de la dite municipalité locale de la paroisse de St. Norbert d'Arthabaska; et qu'il plaise à l'un des Honorables Juges de déclarer que Charles Adrien Pacaud n'a aucun droit d'exercer la dite charge de Maire de la dite municipalité locale de la paroisse de St. Norbert d'Arthabaska, et que par le jugement à intervenir le dit Charles Adrien Pacaud soit déclaré coupable d'avoir usurpé et de s'être emparé illégalement de la dite charge de Maire de la dite municipalité de la paroisse de St. Norbert d'Arthabaska, et qu'il soit exclu et dépossédé de la dite charge; le tout avec dépens.

Le Défendeur répondit à l'action par une exception à la forme, prétendant que le Juge n'avait pas le droit d'ordonner l'émanation du bref de *quo-warranto*, de la Cour Supérieure du district d'Arthabaska, lorsqu'il était là et alors à Québec, dans un autre district; cette exception à la forme fut déboutée, mais sans dépens: Voir No. 297, Talbot vs. Luneau, (même décision.)

Le Défendeur répondit à la Requête libellée par un plaidoyer spécial, comme suit: 1er. qu'il sait lire et écrire; qu'il réside depuis plusieurs années dans les limites de la municipalité de la paroisse de St. Norbert d'Arthabaska, qu'il y demeure encore, qu'il y possède depuis plusieurs années, jusqu'à ce jour, comme propriétaire en son propre nom, des biens-fonds, tenus en franc et commun soccage, dans les limites de la dite municipalité de la paroisse de St. Norbert d'Arthabaska, de la valeur de quatre cent piastres et au-delà; qu'il est âgé de vingt et un ans accomplis, sujet de sa Majesté par naissance, enfin, bien et dûment qualifié d'après la loi, qu'il a été choisi parmi les habitants de la municipalité, qu'il a été élu conseiller municipal de la dite municipalité de la dite paroisse de St. Norbert d'Arthabaska.

2o. Que le vingtième jour de Janvier dernier, 1862, les conseillers du dit conseil municipal, étant alors en session, ont fait choix du dit Défendeur comme le Maire de la municipalité locale de la paroisse de St. Norbert d'Arthabaska, ainsi qu'il appert par les actes, résolution et élection du dit conseil ici produits comme faisant partie des présentes; que le dit Défendeur, qui était Maire de la dite municipalité locale sans interruption depuis plusieurs années, n'a pas été remplacé par un autre Maire, et qu'il n'y a pas d'autre Maire pour la dite municipalité locale de la paroisse de St. Norbert d'Arthabaska, que lui, le dit Défendeur et que le choix qui a été fait du dit Défendeur comme maire de la municipalité locale de la paroisse de St. Norbert d'Arthabaska, le vingt Janvier dernier, n'a pas été déclaré nul et illégal par la Cour de Circuit pour le dit District d'Arthabaska, quoique depuis ce dit mois de Janvier dernier il ait été tenu un terme de la dite Cour, savoir: depuis le sept au douze Mars dernier; qu'aucun des intéressés à la dite élection municipale ou au choix du dit Maire, ne se soit plaint à la dite Cour.

A cette défense du Défendeur, le Requérent répondit par une défense en

droit, que la défense du Défendeur devait être rejetée en droit; pour entre autres raisons, parce qu'il n'est pas allégué, par le dit second chef, que le dit Charles Adrien Pacaud ait jamais été élu Conseiller pour la municipalité locale de la paroisse d'Arthabaska, et qu'il ne pouvait être Maire de la dite municipalité, sans avoir été préalablement élu conseiller ni qu'il ait été nommé par le gouverneur en conseil par proclamation de son Excellence le Gouverneur Général; par jugement rendu en juin dernier, cette défense en droit du Requérent fut déboutée avec dépens. (même décisions. No. 297, Talbot vs. Luneau, No. 298, Béliveau, vs. Juneau.) A l'Enquête: il fut prouvé que Charles Adrien Pacaud avait été élu Maire, le 28 Janvier, 1858, le 16 Janvier, 1862, et le 21 Janvier, 1862, et qu'il n'y avait pas eu d'autre maire que lui, pour la municipalité de la paroisse de St. Norbert d'Arthabaska, depuis le 28 Janvier, 1858, au mois de Mai, 1862; le Défendeur prétendit qu'il était légalement le Maire de la paroisse de St. Norbert d'Arthabaska, et appuya ses prétentions sur les statuts refondus du Bas-Canada, chapitre 24, sect. 13, §3, qui statue que le Maire demeurera en charge pendant tout le temps qu'il sera membre du conseil, et *ultérieurement*, jusqu'à ce que son successeur soit élu ou nommé et *duement* entré en charge."

Per Curiam.—Le Défendeur, C. A. Pacaud, a prouvé qu'il avait été Maire de la municipalité de la paroisse de St. Norbert d'Arthabaska, depuis 1858, à ce jour: s'il n'avait pas produit la preuve de son élection du 21 Janvier, 1862, il devait demeurer en charge jusqu'à ce qu'il eût été remplacé. Mais ayant prouvé avoir été élu, le 21 Janvier, 1862, il a omis de prouver qu'il avait été élu conseiller, cette omission est fatale, le Requérent doit avoir jugement avec dépens contre le Défendeur, et vu que ce dernier a agi de bonne foi, il ne doit pas être condamné à l'amende. *L'onus probandi* de l'élection, qui a eu lieu en Janvier, 1862, retombait sur le Défendeur et non pas sur le Requérent.

Jugement:—Considering that the Plaintiff hath sufficiently proved the allegations of his petition, that the said C. A. Pacaud, hath wholly failed to show that he was legally possessed of the office of the Mayor of the municipality of the parish of St. Norbert d'Arthabaska, in the manner by him adopted, the Court doth dispossess, put out and remove the said C. A. Pacaud, from the said office of mayor of the municipality of the Parish of St. Norbert d'Arthabaska, and the Court adjudged and condemned the said C. A. Pacaud to pay costs.

G. Talbot, procureur du Requérent.

L. G. Houle, et Chs. Leclère, Conseils.

E. L. Pacaud, Procureur du Défendeur.

Wm. Duval, Conseil.

N. B.—Même décision dans les causes, No. 297, Talbot et Ambroise Luneau. No. 298, J. Bte. Béliveau vs. Pierre Juneau.

(N. L. P.)

MONTREAL, 1st. DECEMBER, 1862.

Coram MONK, J.

No. 386.

Brisson vs. McQueen.

HOLD.—1st. that when the Defendant in an action of *capias ad respondendum* has failed to appear, and default has been entered against him, owing to an accident whereby instructions for the defence of said action were not communicated to Defendant's Attorney until after said default, the said default will be taken off and Defendant allowed to plead, on motion supported by affidavit showing the facts and that the defendant has a good defence and on payment by defendant of fifty shillings costs.

2. That a writ of *capias ad respondendum* will be quashed on motion, if the place where the debt was contracted is not mentioned in the affidavit.
3. That where a party has pleaded to the merits in an action of *capias ad respondendum*, and has also moved to quash the *capias*, he will be considered to have submitted to the jurisdiction of the Court, and a motion subsequently made by him to set aside and reject the writ and declaration in the cause on the ground of want of jurisdiction, will be rejected with costs.

In an action of *capias ad respondendum* default had been recorded and the Plaintiff had proceeded with his evidence when the Defendant on the 17 Nov. 1862, presented to the Court a motion to the effect that he had a good defence to the action, and by accident the instructions for its defence were not communicated to Defendant's Attorney, until after default had been recorded, and prayed that the default be taken off and that the Defendant be allowed to appear by the undersigned his Attorney George Macrae, Esq.

This motion was supported by the following affidavit: "Alexander T. Paterson of the City and District of Montreal, Merchant, being duly sworn, maketh oath, and saith that he is one of the Partners composing the firm of Gillespie, Moffatt and Company, Merchants, of Montreal; that the said Gillespie, Moffatt and Company, were the Consignees at Montreal of the ship or vessel, called the "Hastings" of London, in England, of which the Defendant was master or commander, in the month of September last; that on, or about, the seventh day of October, now last past, the said ship or vessel sailed from Quebec, for England, and the said Gillespie, Moffatt and Company were informed, by the consignees of said ship, at Quebec, Messrs. Gillespie, Crawford and Company of Quebec, Merchants, that the said James McQueen, Defendant in above cause had been arrested at Quebec, at the suit of the said François Brisson, the Plaintiff in the above cause, for an alleged debt, which he pretended was due and owing to him, by the said James McQueen, and the said Messrs Gillespie, Crawford and Company requested the said Gillespie, Moffatt and Company to endeavour to effect an arrangement with the said François Brisson, in order to avoid litigation; and stated that they had consulted a lawyer in Quebec, with reference to the matter; that the said Gillespie, Moffatt and Company endeavoured so to effect an arrangement, but unsuccessfully; as the said François Brisson demanded more than they were authorized to allow him. That this Deponent and the said Gillespie, Moffatt and Company, were under the impression and belief, that the said consignees, at Quebec, had instructed some Attorney, or Counsel, in Quebec, to appear in and defend the said suit or action, and that being under such an impression the said Gillespie, Moffatt and Company did not in sufficient time, instruct any Attorney, or counsel, in Montreal, to appear in, and defend said

action. That it was only on or about the thirty-first day of October now last past that the said Gillespie, Moffatt, and Company were informed and ascertained that default had been entered against the Defendant. That they immediately instructed their Attorney, George Macrae, Esquire, to appear in, and defend said action, on behalf of the said James McQueen, who has, as Deponent is credibly informed, and verily believes, a good and valid defence to urge to the said action and *demande* of the said François Brissou, in the above cause; and that it was altogether owing to accident and misapprehension, on the part of the said Gillespie, Moffatt and Company, that instructions were not sooner communicated to their said Attorney, regarding the said action, so as to enable him within the proper time to file an appearance on behalf of the said James McQueen, and further deponent saith not and hath signed.

(Signed) A. T. PATERSON.

On the 20th November 1862, His Honour Mr. Justice Monk gave judgment granting said motion, allowing the Defendant to appear in the said cause by his Attorney, George Macrae, Esquire, upon the payment by the said Defendant of the sum of fifty shillings currency costs, to the said Plaintiff, and ordering the said Defendant to plead to the action within three days.

On the 24th November, 1862, being within the delay limited by the Court, the Defendant pleaded to the merits under protest ("hereby protesting that the present action is not susceptible of the jurisdiction of this Court or entitled to the privileges thereof; and that moreover in this cause, this Honorable Court does not appear either by the writ or declaration, in this cause fyled, to be properly seized with this cause, nor to have jurisdiction in this matter.")

On the same day the Defendant's Attorney presented a motion to quash and set aside the said writ of *capias ad respondendum*, "and that the said James McQueen be declared to have been wrongfully and illegally arrested and held to bail, under and by virtue of the said writ, and that he be released and discharged from under the said writ of *capias ad respondendum* for the following among other reasons:"

1st. "Because in the affidavit upon which the said writ of *capias ad respondendum* was issued, it is not mentioned where the domicile of the said James McQueen is, or was at the time of the making of said affidavit, nor in what District he was, there being nothing in said affidavit, to indicate that this Court had, or has any jurisdiction, in this matter, or that the Prothonotary of this Court had any right or authority, to issue or grant the said writ for the arrest of the said James McQueen.

"2d. Because in the said affidavit, it is not stated where the alleged debt was contracted, nor where the said work therein alleged, to have been done by the Plaintiff, was done, or performed, nor that the same was done and performed at the special instance or request of the said James McQueen; nor is it stated, or specified, in detail, in said affidavit what such work was, or when or how performed.

"3d. Because in said affidavit, the grounds upon which said affidavit was made by the said François Brissou, the Plaintiff, are not specially set forth, as required by law, nor is it stated or specified, what information the said Fran-

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"çois Brisson received from the three persons, therein mentioned (to wit, Pierre Cavalier, François Mondor and Joseph Bilodeau), nor is there anything, in said affidavit to shew that the information, received by said François Brisson, was sufficient to justify, or warrant his making said affidavit or obtaining said writ of *capias ad respondendum*.

4th. Because it is not stated, in said affidavit, that the departure of the Defendant, from the province of Canada "would deprive the Plaintiff of his remedy against the Defendant."

7th. Because in the said writ of *capias ad respondendum*, no mention is made of the domicile of the said James McQueen; nor does it appear therein, where his domicile is or was at the time the said writ issued, nor that he was, or had ever been within the jurisdiction of this Honorable Court.

8th. Because it does not appear, in or by the said writ, that this Court had or has jurisdiction in this matter, nor that the prothonotary of this Court had a right, or was justified in issuing the said writ, or in addressing the same to the sheriff of the District of Quebec as he did.

9th. Because the sheriff of the District of Quebec who arrested the said James McQueen under the pretended authority of the said writ, was not authorized or justified, by law, in so arresting the said James McQueen, at Quebec, under the said writ.

10th. Because the said writ of *capias ad respondendum* was and is informal, illegal, defective, and null and void, and insufficient to warrant or justify the arrest of the said James McQueen."

On the 27th November 1862, His Honour Mr. Justice Monk gave judgment granting the motion and quashed and set aside the writ of *capias ad respondendum*, and ordered that the said James McQueen be released and discharged from under the said writ of *capias ad respondendum* with costs against the said Plaintiff.

Immediately after the above judgment was rendered quashing the *capias*, and on the same day, the Defendant's attorney presented the following motion "Motion, by and on behalf of the said James McQueen,—Inasmuch as there is nothing, either in the writ of summons (or process,) or in the Plaintiff's declaration, in this cause, (the writ of *Capias ad Respondendum*, in this cause issued, being quashed and set aside,) or, in fact, upon the face of the record of proceedings, in this case, to indicate or shew that this Honorable Court is properly, seized of the present cause, or has Jurisdiction, in this matter, or that the present action is one, which has properly arisen in, or comes within or under the jurisdiction of this Court. And moreover, inasmuch as no service of the Plaintiff's declaration, in this cause, has ever been made, upon the said James McQueen, and no return whatever of any proper service of said declaration, upon the said James McQueen, is filed, or appears of record, in this cause, that the said writ of summons and the said declaration be declared and held to be null, void, and of no effect, as before this Court; and that the parties be declared not to be, properly before this Honorable Court, and be hence dismissed, *mis hors de Cour*."

Macrae, G. In support of the foregoing argued, firstly, that the motion was grounded upon the fact, that the Plaintiff's action was only for \$141. 0, a sum

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in ordinary cases actionable in the Circuit Court, but brought under the jurisdiction of the Superior Court solely owing to the exceptional proceeding of a *capias ad Respondendum* having been taken out. That the *capias* being now quashed the action was divested of the only feature which brought it within the cognizance of the Superior Court. It was now reduced to an ordinary action of \$141. 0. in the Circuit Court. Secondly, No domicile was assigned to the Defendant in the writ, and there was nothing in the writ to shew that the party even had a domicile to bring him within the jurisdiction of the Court, and this case being now divested of the features of an attachment, the Court on looking at the record would perceive that there was no service of the declaration upon the Defendant. A copy of the declaration had been left at the Prothonotary's office for the Defendant, such a service was certainly legal in cases where an attachment was maintained. But as this case by the quashing of the *capias* had been reduced to a simple action for debt in the Circuit Court, there was no service on the Defendant at all. For all these reasons the Court had no jurisdiction in the matter and had a right upon motion to send the parties out of Court. The Defendant's counsel added that he was informed that the Superior Court had on a former occasion, without motion of counsel taken upon itself to send the parties out of Court in a similar case and the Court had now a right to refuse to take cognizance of the action also and to send the parties out of Court.

On the 1st December, 1862, Judgment was rendered on said motion. *Per Curiam*.—Monk, J. A *capias* had been taken in this case. Defendant failed to appear and the case proceeded by default. Some time after, Defendant moved to take off the default and to be allowed to appear. The Court allowed this motion and granted him three days to plead. He then moved to quash the *capias*, meantime pleading to the merits under protestation. The motion to quash was granted. Defendant now moved that the case be sent out of Court, *mis hors de cour*, because there was nothing in the writ of summons or declaration or on the face of the proceedings to show that the Court had jurisdiction. There were three difficulties in the way of granting this motion:—First, Defendant had allowed the case to go by default; secondly, Defendant had moved to quash the *capias*, and thereby allowed the Court to have jurisdiction; thirdly, Defendant had pleaded to the merits. He could not be allowed to recede from this.

At the same time His Honor remarked that Defendant's Counsel appeared to have omitted nothing that could, under the circumstances, be done in the case for the benefit of his client; and that although the present motion would not be granted, still, considering the irregularities and defects apparent upon the face of Plaintiff's proceedings, the Defendant need have very little apprehension as to the final result of the action; for that when the case would come up for hearing on the merits, the Plaintiff, owing to these irregularities and defects, could not possibly obtain a judgment against the Defendant.

The judgment was thus motivé. "The Court, &c., considering that the said James McQueen having pleaded to the merits of the action and demand of the said Plaintiff, as set out in the said declaration and writ, hath thereby submitted to the jurisdiction of this Court and hath rendered himself incompetent now to

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urge the matters set out in his said motion for the rejection and setting aside of the said writ and declaration as null and void. It is ordered that the said James McQueen take nothing by his said motion with costs to the said Plaintiff against him the said James McQueen the Defendant in this cause, taxed at the sum of eleven shillings and eight pence."

Motion rejected.

Fontaine, Fontaine and Mireau, for Plaintiff.

George Macrae, for Defendant.

(J. L. M.)

COURT OF QUARTER SESSIONS.

MONTREAL, 16TH FEBRUARY, 1863.

Coram SEXTON, RECORDER.

THOMPSON,

Appellant.

AND

BELLEMARE,

Respondent.

- Held:—10. That the Recorder has no jurisdiction to decide upon the objection that no evidence of record exists to show that the amount of the penalty and costs had been deposited with the Clerk of the Peace within fifteen days from the date of the judgment, according to section 51 of chap. 6, Cons. Statutes of L. C.
20. That such an objection ought to have been raised before the Judge of the Superior Court, who allowed the appeal under section 40 of said act.
30. That the transferee of a license must comply with all the formalities required by section 16 and sub-section 2 of said act, before he can exercise the rights granted by such license.

Upon the return of this appeal, a preliminary objection was raised by the Respondent, on the ground that there was no evidence before the Recorder of the deposit required by the section 51 of chap. 6, Cons. Stat. L. C., and that such an objection could not be made before the Judge of the Superior Court, inasmuch as the petition being presented within eight days after the making of the conviction, his judgment allowing or rejecting the petition for appeal might have been rendered on the ninth day or on any other day before the expiration of the delay allowed for making the deposit.

That the Judge of the Superior Court could not take this objection into consideration in rendering his judgment.

That the General Quarter Sessions of the Peace has no jurisdiction over such an appeal, unless the Appellant proves that he has deposited the amount of the penalty and costs according to the requirements of the 51 section of chap. 6 of the Cons. Stat. for L. C.

The recognizance formerly required upon such appeals having been superseded by the deposit and constituting a condition precedent to the rights of being heard at Sessions, the same rule must now apply to the certificate of such deposit. Paley, p. 312.

The production of a certificate of such deposit at the time of the hearing is one of those acts of the party appealing, which must be observed, without being questioned or called upon by the Respondent.

Paley, pp. 320, 321:—

If the *want of proof*, that the recognizance was entered within the delay prescribed by law, compelled the Sessions to dismiss the appeal, as stated in Paley's work, p. 318, the want of *proof* of the deposit ought to have the same effect.

The certificate ought to have been returned to the Court of Quarter Sessions of the Peace before the right of appeal becomes absolute.

Saunders's Magistrates' Courts, p. 292.

On the 18th February, 1863, the Recorder quashed the conviction for the reasons mentioned in the following remarks:

In this case, the Appellant enumerates in his motion to quash, the following as the reasons why his motion should be granted:—

1st. That the exception relating to distillers, contained in the first clause of chapter 6 of the Consolidated Statutes of Canada, is not expressly negated in the conviction.

2nd. That the attorney's fees allowed by the convicting Judge were illegally included in the costs granted to the prosecutor.

Before adverting to these reasons, it may be well to dispose of some objections raised *in limine* against the hearing of the appeal. The first was, that as the Judge of Sessions is vested with all the powers of two Justices of the Peace, no appeal from his decision was given by the Statute, and that it was so held by Mr. Justice Badgley on the 31st December last.

With this the present Court had nothing to do. Mr. Justice Smith having seen fit to differ in opinion with Mr. Justice Badgley, and to order an appeal in the present case, his order was obligatory on the Court to which it was directed. The present Court had no authority to revise the decision of the superior tribunal, and it would be indecorous and improper to offer any opinion on the question at issue between the Judges. The other objections related to certain alleged informalities in the notices arising out of the appeal, and to a fact apparently of more consequence than all the rest, that there was no evidence of record to show that the amount of the penalty and costs had been deposited with the Clerk of the Peace within fifteen days from the date of the judgment. All these were exceptions that should, and no doubt would have been urged before Mr. Justice Smith, if well founded. The judgment appealed from was rendered on the 17th December last, and the order granting the appeal not made until 43 days afterwards. If then the money had not been deposited according to law, no doubt the appeal would have been refused.

With regard to the first exception, I am of opinion that even according to the authorities cited, it was not necessary to negative the averment contained in the 1st section, in a prosecution brought for the penalty imposed by the 22nd section of the Statute; and I find it was so decided by Mr. Justice Smith in the case No. 235, *ex parte* John Moley for a writ of certiorari, so recently as the 31st December last, independently of which, the conviction is in the form E, supplied by the Statute, by the 43rd section of which it is enacted that the forms annexed to the Act, or other forms to the like effect, shall be sufficient. This is perfectly conclusive; for had the Legislature intended the averment to be negated in the the proceedings, it would have embodied negation in the forms.

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With regard to the second exception, the attorney's fee, it is provided by the 53rd section of chap. 103 of the Cons. Stat., that in all summary convictions the justice may award such costs as may seem reasonable and not inconsistent with the fees established by law. The costs in question must certainly have appeared reasonable to the Judge, or he would not have awarded them, and it has not been shewn that they are inconsistent with the fees established by law. Besides which, this question, like the former one; has been already determined in the case of Moley.

A more important reason for quashing the conviction was urged. It is embodied in the petition, and was dwelt upon at some length in the argument. It is, that the Appellant having obtained from Sharpley, a licensed tavern keeper, a transfer of his premises, had three months' delay, within which to produce a certificate to the Revenue Inspector and obtain a transfer of the license; and that in the meanwhile he had a right to sell in the premises transferred to him. This is a most extraordinary pretension, and wholly unwarranted. The transferee of the premises cannot exercise the rights granted by the license for a single hour, until he shall have obtained in due form a transfer of the license. The three months' delay are given to the original holder, within which he or his representatives may find a suitable person, to whom to make a transfer, and failing to do so within that delay the license becomes void.

It is not only necessary for the transferee, to obtain the certificate of the 50 Municipal Electors, but also the approval of the Corporation signed by the Mayor and City Clerk, to enable him to obtain a valid transfer or to justify the Revenue Inspector in making the endorsement on the license required by the act. I mention this because a contrary practice obtains, which if found to be illegal, may be attended with much inconvenience to the parties concerned. The practice has been for the Revenue Inspector to transfer the license, upon the Transferee producing a certificate signed by 50 municipal electors, without any proof of approval of that certificate by the Council. Now the words of the section authorizing the transfer are these: "But the person in whose favour such transfer is made shall produce to the Revenue Inspector a certificate, and enter into a bond with sureties such as was required of the original holder of such license;" and the 9th section explains what was the certificate exacted from the original holder, viz., a certificate signed by fifty municipal electors approved of by the City Council, and signed by the Mayor and City Clerk: the Council alone being authorized to exact proof both of the authenticity of the signatures of the municipal electors.

The last exception is not included either in the Appellant's motion, or his petition though adverted to in the argument. It is that the depositions taken in this cause do not appear to have been either read over to, or signed by the witnesses. The 47th section, under which the conviction was obtained, provides that, "In every prosecution for any contravention of the provisions of this Act the depositions of the witnesses shall be reduced to writing by the Clerk of the Peace, or some one appointed by him, or by the justice trying the case, and shall be filed of record in the cause, in like manner, as if the same had been taken in the Superior Court for Lower Canada." The second clause of

the 95 section of the 83 cap. of the Cons. Stat., defines the manner in which witnesses shall be examined in the Superior Court; and it expressly provides, that the notes of evidence *shall be read over to the witness, and he shall sign them*. The depositions in this case do not appear to have been read over to the witnesses. They have not been signed by them, and contain no statement that the witnesses were unable to write. They, therefore, cannot be regarded as legal evidence. It is to be regretted that a conviction in every other respect so well founded, should be invalidated by an informality, by an omission of the Clerk overlooked by all the parties—by the learned Judge of Sessions, in the multiplicity of his arduous labors, as well as by the advocates. The omission is nevertheless fatal, and the convictions based upon those depositions must consequently be quashed, but without costs—it not being in the power of the Courts to award costs even if it were disposed to do so, which it certainly is not under the circumstances.

The judgment is as follows:—

The Court, having heard the parties by their counsel respectively, having examined the record and proceedings in this cause and deliberated thereon, considering the depositions of Richard Creagh, Charles William Sharpley, and Peter Casey, filed of record as the depositions of the witnesses in this cause are illegal and no evidence, the said depositions not having been read over to or signed by the said witnesses, and that there is consequently no evidence of record to justify or sustain the said conviction, doth maintain the present appeal, and doth quash and set aside the conviction from which the present appeal was instituted and returned before this Court, without costs.

Kerr & Nagle, attorneys for Appellant.

Lafrenaye, attorney for Respondent.

(P.R.L.)

CIRCUIT COURT.

MONTREAL, 11TH OCTOBER, 1862.

Coram SMITH, J.

No. 316.

McDonald et al., vs. Gamble.

Held:—10. That in any appealable action, wherein any of the parties may have neglected to file an answer or reply within the delay prescribed by law, such party shall be foreclosed from filing the same by the mere lapse of time, and issue shall be deemed joined by the proceedings already filed.

20. That no motion can be made to reject an exception irregularly filed, except within the delay fixed by law for answering in such court.

This was a motion to reject an *exception à la forme* as having been irregularly filed, and not within the delay prescribed by law. The action was returned on the first day of August, 1862, and an appearance was filed the same day.

The exception was served on Plaintiff's attorneys and filed in Court on the fifth day of September, 1862; on the eighth day of October following, the Plaintiffs served on Defendant's attorneys a motion for the eleventh of October, to have the exception rejected from the record for the following reasons.

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10. Parce que la dite exception péremptoire à la forme n'a pas été produite dans les quatre jours qui ont suivi le jour du retour de l'action en cette cause.

20. Parce que l'action en cette cause ayant été rapportée le premier août dernier, et le Défendeur ayant comparu le même jour, la dite exception péremptoire à la forme aurait dû (aux termes de la loi) être produite dans les quatre jours qui ont suivi la vacance, c'est-à-dire, dans les premiers quatre jours de septembre dernier, tandis qu'elle n'a été produite que le cinq septembre dernier.

SMITH, J.—This motion comes too late and cannot be granted, issue being joined by mere lapse of time in virtue of the 75 section of ch. 83, of the Consolidated Statutes for Lower Canada. The exception à la forme was not filed within the delay prescribed by law, but the motion to reject it should have been made at the proper time and before issue was joined thereon.

Motion rejected.

Bondy & Fauteux, for Plaintiffs,
Kerr & Nagle, for Defendant.
(S.B.N.)

COUR DE CIRCUIT.

MONTREAL, 31 DECEMBRE, 1862.

Coram SMITH, J.

No. 294.

Perkins vs. Leclaire et al.

Jugé;—Que plusieurs débiteurs non solidaires peuvent être poursuivis par la même demande, et condamnés à payer diverses sommes de deniers individuellement, mais solidairement aux frais de l'action.

Le Demandeur réclamait des Défendeurs conjointement et solidairement la somme de \$107.46,—pour la valeur de certaines écritures et certaines traductions faites par le Demandeur, pour le profit commun des Défendeurs, et à leur réquisition.

Les Défendeurs plaidèrent séparément. François et Jean Leclaire, que le Demandeur ne méritait avoir que \$88.25, à compte de laquelle ils lui avaient payé \$50, laissant due \$38.25, qu'ils offrirent avec les frais; et Macfarlane, par sa défense, alléguait qu'il avait toujours offert la somme de \$35, comme étant une juste rémunération des ouvrages faits par le Demandeur, en autant que lui, Macfarlane, y était concerné.

Sur la preuve faite par le Demandeur, la Cour rendit jugement en sa faveur pour \$63.11, contre F. & J. Leclaire, et pour \$44.35 contre Macfarlane, et de plus, la Cour les a condamnés aux dépens, comme suit:—"And the Court doth condemn all the Defendants jointly and severally to pay the costs of this action."

John Monk, avocat du Demandeur.

Drummond & Bélanger, avocats de F. & J. Leclaire.

R. & G. Laflamme, avocats de Macfarlane.

(P.R.L.)

MONTREAL, 11 DECEMBRE 1862.

Coram MONK, J.

No. 86.

Melo vs. O'Heir.

Jugé:—Que la prescription aura son cours nonobstant une instance quelque contestée mais périmée, dans laquelle certaines admissions de la dette auraient pu être faites.

Le Demandeur poursuit pour le recouvrement d'un billet, daté le 28 janvier 1850, et payable à demande pour £28 souscrit par le Défendeur en faveur du Demandeur.

Le Défendeur opposa cette action par la prescription statutaire de cinq ans.

Le Demandeur répondit spécialement à cette défense comme suit:—Que le Défendeur a, avant l'institution de cette action, reconnu devoir le billet, ainsi qu'il appert par la défense qu'il a faite à une première action intentée pour le recouvrement du dit billet, laquelle action a péri faute par le Demandeur d'avoir procédé dans les trois ans—et que la reconnaissance contenue dans la dite défense a eu l'effet d'interrompre la prescription, et que la dette réclamée ne peut être prescrite maintenant que par le laps de trente ans à compter de la dite reconnaissance.

La défense en question était ainsi conçue:—"That the only consideration or value which he, the Defendant received from the Plaintiff for the promissory note in the Plaintiff's said declaration mentioned was the sum of £7 and no more, by means whereof there was at the time of the institution of this action, and there still is only due by the Defendant to the Plaintiff, on the said promissory note, the sum of £7 and no more; and this last mentioned sum of money the Defendant is willing and offers to pay the Plaintiff with costs as in an action for the said last mentioned sum."

Le Défendeur répliqua spécialement,—“That such plea, filed by the Defendant in the former action by Plaintiff against him Defendant, does not contain any acknowledgment sufficient in law to remove or take away the bar or prescription pleaded by Defendant which is absolute.” Le jugement de la cour renvoie l'action et est motivé comme suit:

“The Court * * * considering that the cause of action mentioned and set forth in Plaintiff's declaration did not nor did any of them accrue to the Plaintiff, nor did the said Defendant undertake and promise at any time within five years next before the commencement of the present suit;—Considering that the acknowledgment contained and set forth in Defendant's plea, filed on the 3rd February, 1855, in the cause No. 14 before this court in which the present Plaintiff was Plaintiff, and the present Defendant was Defendant, and referred to and pleaded by the said Plaintiff in his special answer made and filed in this cause to the Defendant's plea firstly pleaded, is not an acknowledgment which could change or did interrupt the prescription invoked by the said Defendant, inasmuch as the said acknowledgment was made in a cause which afterwards lapsed and was extinguished by *péremption*, and inasmuch as such acknowledgment, even if its force and effect had survived such *péremption*, which was not the case, could not and did not establish in favour of Plaintiff the presumption by him contended for, in his special answer, was moreover made more

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than five years previous to the institution of the present action, doth maintain the exception firstly pleaded by the said Defendant, and doth dismiss the present action with costs.

Dorion, Dorion & Sénécal, attorneys for Plaintiff.

John Monk, attorney for Defendant.

(P.R.L.)

MONTREAL, 24TH MARCH, 1863.

Coram MONK, J.

No. 5220.

Lord vs. Moir et vir and Pratt mis en cause.

Held:—That a rule, which orders a guardian to a seizure of moveables to produce to the seizing bailiff a missing piece of furniture of which he was guardian, and in default of his doing so, that he be "contraint par corps" and imprisoned in the common jail of this District, until he had produced the missing article, *nisi causa*, is defective in form in not giving the guardian the alternative of paying the value of the article.

The Plaintiff having obtained judgment against the Defendant, a married woman, and taken in execution her moveables, and appointed a guardian to the seizure who failed to produce on the day of sale an article styled "book case en acajou," the Plaintiff took a rule on the guardian returnable and returned in Court on the 10th March, the imperative portion whereof was in the following words: Ordonné en conséquence au dit Noël Pratt gardien et mis en cause, de remettre et représenter au dit huissier saisissant le susdit "Book stand en acajou" mis sous ses soins et sauve-garde comme susdit, et que faute par lui de ce faire, il soit contraint par corps et incarcéré dans la prison commune de ce district jusqu'à ce qu'il ait représenté le susdit objet, savoir, "un book case en acajou," à moins que cause au contraire ne soit montrée mardi, le dixième jour de Mars prochain à dix heures et demie de l'avant midi cour tenante, le tout avec dépens."

The rule being called on Court, the guardian made default.

Per Curiam.—The Court can not make this rule absolute. It is defective in form inasmuch as it does not give the guardian the alternative of paying the value of the missing article.

Dejardins, for Plaintiff.

Rule discharged.*

Girouard, for mis en cause.

P. W. T.

MONTREAL, 31ST DECEMBER, 1862.

Coram SMITH, J.

No. 2013.

Platt vs. Kerry et al.

Held:—That a clause in a lease, "That the said lessees shall pay all extra premium of Insurance, that the Company, at which the premises now leased may be insured, shall exact in consequence of the business or works done or carried on therein by the said lessees," applies to all extra premiums of Insurance charged on account of the *actual* nature of the business carried on by the lessees, and does not merely contemplate hazardous contingencies which may afterwards arise, such as the erecting of steam-engines, &c.

The Plaintiff brought an action to recover \$187.50, being for extra premium of Insurance alleged to be due under a lease. The lessees, Carter, Kerry & Co.,

* Note of Editor. The leading case on the form of these rules is that of *Levenson* and *Boston* 2. L. O. Jur. : 297: in appeal, which decided that the alternative form is unnecessary.

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were chemists and druggists, and leased the premises for the purpose of carrying on their trade.

Amongst other stipulations in the lease was the following, "That the said lessees shall pay all extra premium of Insurance that the Company, at which the premises now leased may be insured, shall exact in consequence of the business or works done or carried on therein by the said lessees." The Plaintiff's declaration stated that the Defendants had paid the rent due during their occupancy of the premises leased, but had totally failed and refused to pay the extra premium of Insurance, which in consequence of the nature of the business carried on by the lessees the Insurance Company had charged. That in consequence the Plaintiffs had to pay the amount themselves, and had a right to demand it of Defendants by the present action.

The plea to this action was to the effect that the clause in the lease on which Plaintiff relied did not mean that the lessees were to pay a portion of the ordinary premium of Insurance which the Plaintiff might be obliged to pay for the premises leased as a chemists' and druggists' warehouse, "but that on the contrary such premium of Insurance was in respect of the said premises the ordinary and usual rate of Insurance thereof, and was not nor was any part thereof extra premium of Insurance within the meaning of the said clause."

At *Enquête* Plaintiff proved that an extra premium of 7s. 6d. per cent, amounting to the sum sued for, had been charged by the Insurance Company on account of the lessees occupying the premises as chemists and druggists.

Per Curiam.—This is an action to recover the excess of Insurance, which according to the lease was to be paid by the Defendants as tenants, on account of the trade they carried on, being the unusually hazardous one of wholesale chemists, &c. Defendants' pretension was that the clause in the lease did not apply to the extra premiums on their actual business, but was inserted to cover the case of their erecting steam-engines, or going into other hazardous kinds of manufacture. The Court cannot read the lease in that way.

Judgment for Plaintiff.

John Dunlop, for Plaintiff.

Abbott & Dorman, for Defendants.

(J.L.M.)

MONTREAL, 13 FEVRIER 1863.

Coram MONK, J.

No. 4971.

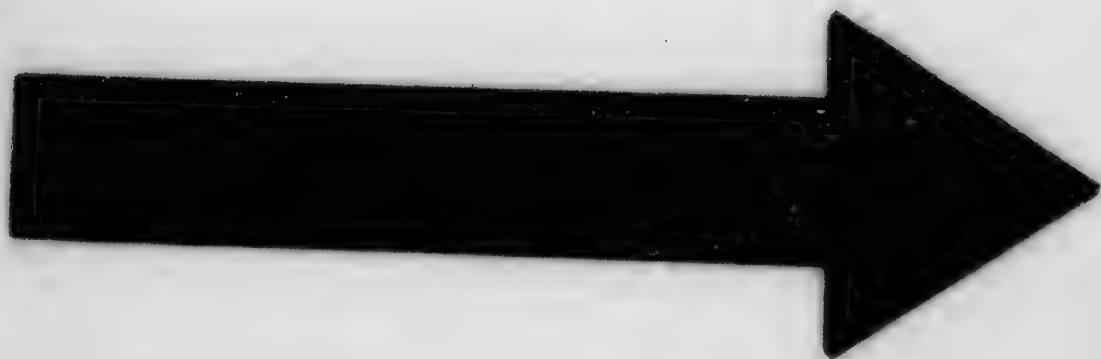
Leclerc vs. la Corporation de la Paroisse de St. Joachim de la Pointe Claire.

Jugé:— Que le Conseil d'une municipalité ne lie cette dernière par ses actes qu'en autant qu'ils sont conformes à la loi.

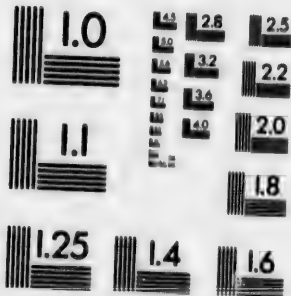
20. Qu'un Surintendant spécial est un officier municipal.

30. Que les aubergistes sont absolument inhabiles à remplir la charge de Surintendant spécial ni aucune autre charge municipale.

Le Demandeur Moïse Leclerc, alléguait dans son action, que dans l'année 1861, il avait été nommé Surintendant spécial pour répartir certains chemins de la Défenderesse; qu'en conformité à cette demande de la Défenderesse, il avait en effet réparti ces chemins et avait fait deux rapports ou procès-verbaux qui



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avaient été homologués sans opposition aucune et même suivis d'exécution de la part des intéressés et de la Défenderesse ; que les services et déboursés qu'il avait fait dans l'exécution de ses devoirs, se montant à la somme de £17, que la Défenderesse avait reconnu lui devoir, et promis de lui payer par une résolution de son conseil.

A cette action, la Défenderesse plaida qu'à toutes les époques où le Demandeur avait agi comme tel Surintendant spécial, et depuis au-delà de dix années, il était et est encore aubergiste, dûment licencié à vendre en détail des liqueurs spiritueuses ; et que pour cette seule raison, il était complètement disqualifié et inhabile à agir comme tel Surintendant spécial, et qu'enfin cette disqualification emportait la nullité de tous ses procédés et travaux, et que partant il ne méritait pas de réclamer aucun salaire pour les avoir exécutés.

À l'audition, *Mr. Belournay* pour le Demandeur, soutenait qu'un Surintendant spécial n'était pas un officier municipal, aux termes de l'acte des municipalités, qu'il ne prêtait pas le serment requis des officiers municipaux, qu'il n'était pas nommé pour aucune période de temps fixe ; qu'en un mot, il paraissait plutôt être un employé, un serviteur de la municipalité, qu'un de ses officiers ; que d'ailleurs, fût-il même officier public, l'aubergiste n'était pas absolument disqualifié de l'être, que la clause établissait seulement une exemption, la faculté pour les aubergistes et autres y nommés d'accepter ou de renoncer, mais non une incapacité, une inhabilité emportant de plein droit, nullité des actes.

Mr. Girouard, pour la Défenderesse, dit qu'il lui suffisait d'établir deux choses pour obtenir le débouté de l'action, 1o. Que le Surintendant spécial, agissant sous l'autorité du Conseil, était un officier municipal et qu'il remplissait réellement une charge municipale ; 2o. qu'il était défendu aux aubergistes de remplir aucune charge municipale à peine de nullité de leurs actes et procédés.

Que la section 30e de l'acte des municipalités avait dévolu toutes les attributions et tous les pouvoirs de la charge de Surintendant du comté au Surintendant spécial, agissant sous l'autorité du Conseil ; et que son intention d'en faire un officier municipal comme celui qu'il est appelé à remplacer, est si évidente, qu'au paragraphe 3e de la même section, il est statué que tout Surintendant spécial, "*sera sujet aux mêmes pénalités que les autres officiers municipaux en cas de négligence,*" et enfin, qu'au paragraphe 4e de la même section, il est déclaré que "*le secrétaire trésorier pourra être nommé comme tel Surintendant spécial et pourra remplir les devoirs des deux charges.*"

Que la section 31e établissait l'incapacité de l'aubergiste à remplir aucune charge municipale, que ses termes étaient décisifs et absolus : "*Ne seront pas élus ou nommés conseillers municipaux, ou nommés à une charge sous le Conseil, les personnes dans les ordres sacrés, ou les ministres d'une croyance religieuse quelconque ; les membres du conseil exécutif, les juges de la cour du banc de la reine, de la cour supérieure, ou de la cour de vice-amirauté, les shérifs, les officiers en pleine paie de l'armée ou de la marine de sa Majesté, comme indignes de leur état,*" ni les aubergistes" comme trop dignes de leur état ; que par ces termes, le statut n'entendait évidemment pas ordonner une exemption, mais

une inhabilité, que les exemptions étaient contenues dans le paragraphe 5e de la même section 31e, qu'enfin pour cette seule raison, le Demandeur aurait dû refuser la charge que lui avait offerte le Conseil de la Corporation; qu'il avait agi contre la loi; que ses procédés étaient absolument nuls et nuisibles aux intérêts de la Défenderesse, qui n'avait pu les mettre à l'exécution, mais les avait annulés au contraire, et que partant ils ne méritaient pas d'avoir aucun honoraire ni salaire.

Per Curiam.—La question soulevée ne me paraît souffrir aucune difficulté. Les dispositions sont formelles et déclarent clairement que le Surintendant spécial est un officier municipal, non permanent, mais temporaire, nommé pour une affaire particulière, et enfin que les aubergistes sont absolument inhabiles à remplir cette charge. Le Conseil en adoptant le compte du Demandeur a agi ouvertement contre la loi, et n'a pu lier la Défenderesse.

Denis et Trudel, pour le Demandeur.

Retournay, Conseil

Girouard, pour la Défenderesse.

(D. C.)

MONTREAL, 15 DECEMBRE, 1862.

Coram MONK, J.

No. 583.

Leclerc.

vs.

La Corporation de la Paroisse de St. Joachim de la Pointe Claire et la même.
Demanderesses en garantie.

vs.

Pierre Charles Valois et al.

Demandeurs en garantie.

- Jugé:—1o. Qu'une personne poursuivie à cause de ses actes comme officier public a droit à un avis d'un mois, bien qu'au temps où l'action a été prise, il ne remplissait plus sa charge.
2o. Qu'un officier public a droit à l'avis d'un mois, quand bien même il serait accusé de fraude ou de mauvaise foi.
3o. Qu'une municipalité n'a pas le recours par voie d'action en garantie simple contre son Conseil pour cause de malversation, malice et mauvaise foi, mais seulement l'action en indemnité.

La Corporation de la Paroisse de St. Joachim de la Pointe Claire, poursuivie par Moïse Leclerc, pour ses honoraires comme Surintendant spécial, ainsi qu'il est dit dans le précédent rapport, appelle par action en garantie simple les Conseillers qui avaient transigé personnellement avec le dit Leclerc, l'avaient nommé tel Surintendant spécial, avaient homologué ses rapports et adopté ses comptes, leur dénonçant la poursuite principale, et les priant de la faire cesser, et demandant enfin qu'ils fussent personnellement condamnés à indemniser la Demanderesse des condamnations qui pourraient intervenir contre elle, pour entre autres raisons les suivantes :

1o. Parce que les Défendeurs, comme mandataires de la Demanderesse, étaient responsables envers elle de la malversation de leurs devoirs et obligations et des dommages qui en résultaient.

2o. Parce que les Défendeurs avaient agi de mauvaise foi, par malice et fraude.

Les Défendeurs rencontrèrent cette action par une exception et une défense au fonds endroit, par laquelle ils demandaient le débout de l'action pour deux raisons: 1o. Parce que la Demanderesse en garantie n'alléguait pas dans son action qu'un avis d'un mois avait été donné aux Défendeurs de l'institution de

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cette action. 2o. Parce qu'il ne résultait des allégués de la déclaration aucune garantie de la part des Défendeurs en faveur de la Demanderesse.

A l'argument en droit, *Mr. Cassidy* pour les Défendeurs, dit que la section 1ère du chap. 101, des statuts refondus du Bas-Canada, lui donnait un moyen de défense infailible en faveur de ses clients; que par cette clause en effet, "aucun bref ne peut être émis contre un juge de paix ou un autre officier, ou personne remplissant des devoirs publics, pour aucune chose faite par lui dans l'exécution de ses devoirs publics, ou à moins qu'avis par écrit de tel bref spécifiant la cause de l'action avec une précision suffisante, ne soit donné au dit juge de paix, officier ou autre personne;" que la Demanderesse n'avait pas donné cet avis et qu'elle ne l'alléguait pas dans son action. Qu'en outre, il n'y avait pas aucune garantie de la part des Défendeurs à indemniser la Demanderesse des condamnations qui pourraient intervenir contre elle par le fait de ses conseillers agissant au meilleur de leurs capacités.

En réponse, *Mr. Girouard*, pour la Demanderesse, soutenait qu'il n'était pas nécessaire de donner aucun avis aux Défendeurs, 1o. parce que lors de l'institution de l'action et depuis plus de six mois auparavant, ils ne remplissaient aucun devoir public, et que la clause du statut n'exige l'avis qu'à l'égard des personnes "*remplissant des devoirs publics*," 2o. parce que les Défendeurs étaient accusés de mauvaise foi, malice et fraude, et qu'aux termes de la section 8e du même acte, déclarant que "*tout juge de paix officier et autre personne, aura droit à la dite protection et aux dits privilèges dans tous les cas où il a agi bonâ fide*, dans l'exécution de ses devoirs, bien, qu'en faisant telle chose, ou commettant tel acte, il ait excédé ses pouvoirs, ou sa juridiction, et ait agi clairement contre la loi," il n'y a que les officiers agissant de *bonne foi*, qui aient droit à l'avis. Que la garantie que la Demanderesse invoque résulte du droit commun; que les Conseillers d'une corporation municipale n'en sont que les mandataires, et comme tels obligés de suivre les instructions que la loi leur donne et d'indemniser la Corporation de tous dommages résultant de la malversation de leurs devoirs et d'une violation grossière de la loi; que les Défendeurs, en nommant ainsi à une charge municipale un aubergiste, avait malversé et violé ouvertement la loi, et était tenus de venir répondre de leurs actes illégaux, de faire valoir eux-mêmes leurs moyens de défense et de le Demandeur principal, et d'indemniser la Corporation, dans le cas où elle serait condamnée; qu'enfin, la mauvaise foi avec laquelle les Défendeurs avaient agi, devait être un motif suffisant de les rendre responsables de cette mauvaise foi.

Per Curiam.—L'action en garantie est mal fondée. La Demanderesse devait donner avis par écrit d'un mois avant de procéder. D'ailleurs, il n'y a pas de garantie de la part des Défendeurs vis-à-vis de la Demanderesse. Elle doit attendre le jugement sur la demande principale de Leclerc, et si elle est condamnée par la faute et la malversation des Conseillers ainsi qu'elle le prétend, elle pourra exercer l'action en indemnité.

Girouard, pour la Demanderesse.

Denis et Desnoyers, pour les Défendeurs.

Cassidy, Conseil.

(D. G.)

PRIVY COUNCIL.

Present: Lord CHELMSFORD, Lord KINGEDOWN, and Sir J. T. COLERIDGE.

HENRY WULFE TRIGGE and ALFRED TRIGGE,

APPELLANTS,

FLAVIEN LAVALLEE.

RESPONDENT.

LOWER CANADA—SEIGNIORIAL RIGHTS—OLD FRENCH LAW—CIVIL LAW—TRANSACTION "DOL"—"ERREUR".

The term "transaction" of the old French law, which is equivalent to a compromise in English law, is an agreement to put an end to disputes, and to terminate and avoid litigation; and, in such cases, the consideration which each party receives is the settlement of the dispute: the real consideration being, not the sacrifice of the right, but the abandonment of the claim; and it is no objection to the validity of such a contract, that the right was really in one of the parties only.

An agreement of compromise, like any other agreement, may be set aside for what the old French law terms "dol" or want of good faith in either of the contracting parties only.

An agreement of compromise may be set aside on the ground of what the old French law terms "Erreur," if the "erreur" relied on be in the compromise, and of such a character, that it must be considered the determining motive of either of the parties in entering into the agreement; its existence is regarded as a condition implied, though not expressed; and then, if the fact fail, the foundation of the agreement fails.

The French law on this subject, as well as the English and Scotch law, adopts the rules of the civil law.

The appellants and the respondent were the owners of adjoining lands, and a dispute having arisen as to certain rights claimed *bond fide* by the appellants, in order to terminate the dispute and difference, the appellants agreed to abandon their claim, and the respondent agreed to pay an annual sum to the appellants. It subsequently turned out, that the appellants' claim was unfounded, whereupon the respondent refused payment of the annual sum so agreed to be paid, on the ground that there was no consideration for the agreement:—Held, that the claim by the appellants being *bond fide*, the consideration for the payment by the respondent was the surrender of the appellants' claim; and that a such a consideration was sufficient to support the respondent's promise.

This was an appeal from the Court of Queen's Bench of Lower Canada, and the substantial question on the appeal related to the validity of a certain agreement entered into on the 21st May, 1847, between Kenelm Connor Chandler, deceased (under whom the appellants claimed), and the respondent Flavien Lavallée, for the purpose of compromising certain disputes which had arisen between the said Kenelm Connor Chandler and the respondent, relative to a certain milldam erected by the respondent in and across that branch of the river Nicolet which separates the Isle de la Fourche from the Seignory of La Baie St. Antoine, and the validity of which agreement was disputed by the respondent, on the ground that he was induced to enter into the said agreement by the fraud of the said Kenelm Connor Chandler, and in ignorance of material facts, and of his the respondent's rights; and upon the further ground, that there was no consideration for the said agreement. By a notarial act of the 8th April, 1844, the then Seigniors of the Seignory of La Baie St. Antoine, conveyed to the respondent and his brother, Plutarque Lavallée, a tenement, comprising the Seigniorial mill of that Seignory, known as the "Moulin Despins," with the dam, and all the rights, privileges, and appurtenances belonging to the said mill; and this mill was situate on the southwestern branch of the river Nicolet, which river or branch is in that part included within the

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Seigniory of La Baie St. Antoine, and is crossed by the said dam, which abuts at its further extremity on the Seigniory of Nicolet, there bordering on the northeastern branch of the same river or branch.

The said mill and dam had, for more than thirty years before the 21st May, 1847, been in the possession of the Seigniors of the Seigniory of La Baie St. Antoine and their *privies* in title; and the said mill had always been moved by the water of the southwestern branch of the river Nicolet.

By a notarial act of the 29th May, 1844, Amand Richard, owner of the tenement within the said Seigniory of Nicolet, whereon the said dam abutted, conveyed to the respondent and his said brother the right of constructing and abutting quays and a dam on the said tenement, with so much land as might be necessary for that purpose. The respondent and his brother proceeded to repair the said dam, when protests against their doing so were served on them on behalf of Kenelm Connor Chandler, then being or claiming to be, seignior of five divided sixths of the said Seigniory of Nicolet, otherwise called Isle à la Fourche, upon such pretext or allegation of a right over the said river or branch, and to prevent the construction or abuttal of such a dam as in the said protests mentioned: Mr. Chandler had in the meantime obtained from the said Amand Richard a conveyance of the said tenement whereon the said dam abutted, and at the same time began digging a canal, by which the water of the southwestern branch of the river Nicolet was threatened to be diverted from the said mill.

By a notarial act of the 21st May, 1847, Mr. Chandler professed to authorize the continuance and repair of the said dam as it then existed, and to bind himself and his heirs not to erect any mill or manufactory, within certain limits on the southwestern branch of the River Nicolet; the respondent, in return, binding himself and his representatives to pay to Mr. Chandler and his heirs 30% currency a year, on the 11th November, so long as he or they should make use of the said dam. The respondent omitted to make the payment which became due on the 11th November, 1857; and the appellants, making title under Mr. Chandler, brought an action to recover the said payment.

Respondent put in a plea, impeaching the validity of the act of the 21st May, 1847, for want of consideration, and as having been entered into through mistake, as to the rights of Mr. Chandler, who did not possess the rights pretended on his behalf, and claimed to be exercised or conveyed by him; alleging also, that the execution of the act by the respondent was induced by the false representations and fraud of Mr. Chandler and his agents. The respondent also pleaded the general issue, and the appellants replied. Admissions were filed on each side, and the respondent examined witnesses, as well as to the facts above mentioned as to others.

The Circuit Court of Three Rivers gave judgment for the appellants on the 21st June, 1859. From this judgment the respondent appealed, and obtained on the 17th December 1859, the judgment of the Court of Queen's Bench in his favor. From this judgment the appellants appealed to her Majesty's Privy Council.

The Solicitor General (Sir R. Palmer, Q. C.), and Lindley, for the appellants.

contended that the agreement of the 21st May, 1847, so entered into between Kenelm Connor Chandler and the respondent was entered into for valuable consideration, and *bonâ fide*: that even if Kenelm Connor Chandler had no such rights over the river Nicolet as he claimed, still the amicable termination of the disputes pending between himself and the respondent was a sufficient consideration to support the agreement: that the undertaking by Kenelm Connor Chandler not to erect any mill within the limits specified in the agreement had been duly observed, and such undertaking was alone a sufficient consideration to render the agreement binding upon the respondent: that there was no consideration for such undertaking, save the agreement by the respondent to pay the annual sum of 30*l.* to Kenelm Connor Chandler: that the right of Kenelm Connor Chandler to prevent the said dam from being constructed across the said river and upon the said island, was the very thing in dispute between himself and the respondent: that it was not competent for the respondent to impeach the agreement upon the ground that such right did not, in truth, exist: that there was no pretence for impeaching the agreement on the ground of fraud: that since the respondents became aware of the facts and circumstances which, as he contended, rendered the agreement invalid, he had recognized the validity of the agreement, and had acted upon and confirmed the same: that the respondent was estopped from denying the title of Kenelm Connor Chandler to grant that which the respondent accepted from him, and had enjoyed by virtue of his concession: that the validity of the agreement had already been determined in favor of the appellants, and against the respondent, by a Court of competent jurisdiction, against whose decision there had been no appeal.

Leranger, Q. C. (Lower Canada bar), and Westlake for the respondent:—There was no consideration given to the respondent by Kenelm Connor Chandler as an equivalent for the annual sum of 30*l.*

The respondent had no consideration for entering into the contract of the 21st May, 1847. Error was the contracting motive (*motif déterminant*) of the contract. The respondent was induced to enter into the contract by fraud.

The following authorities were referred to: Pothier, *Traité du Contrat de Vente* (Dupin's ed.), vol. 2, p. 286; *Traité des obligations* (Dupin's ed.), vol. 1, p. 22, s. 36; Toullier, *Droit Civil*, liv. 3, tit. 3, s. 71; liv. 2, tit. 2, ss. 71, 72, 73; liv. 3, tit. 3, c. 1, s. 42; Domat, *Leg. Delect*, liv. 2, tit. 12; Thibaut, *Système* (Lindley), 128; Troplong, *Droit Civil*, 17, 551, 563; Denisart, *Collection Nouvelle*, "Dol"; *Anc Collection*, "Dol"; Pigeon, *Procédure*, 1, 4. Merlin, *Répertoire*, 34, 375, "Erreur"; Duranton, *Droit François*; Puffendorf, *Barbeyrac*, notes (Kennet's ed.); Domat, "Des Transactions", vol. 1, p. 341; Stewart v. Stewart (6 Cl. & Fin. 911); and Code Civil, art. 2052.

LORD KINGSDOWN delivered the judgment of their Lordships. In the month of March, 1858, the appellants instituted a suit in the court of Queen's Bench, in Lower Canada, against the respondent, to recover a sum of 30*l.*, alleged to have become due to them from him in the month of November preceding. Their claim was founded on a notarial act, dated the 21st May, 1847, by which the respondent engaged to pay the annual sum of 30*l.*, so long as he should use

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a certain mill-dam and quay. The payment was to be made to a gentleman named Chandler, whose rights had become vested in the appellants.

The respondent, in his answer to the suit, did not deny the fact of the agreement, or that he had had the use of the dam and quay during the twelve months for which the payment was demanded; but he alleged that the engagement in question had been obtained from him under a mistake on his part of his rights, and by means of fraud and intimidation on the part of Chandler and his agents; that no consideration had been given to him for the agreement, and he insisted that it ought to be annulled and the appellants' suit dismissed. On the 27th June, 1859, the Circuit Court pronounced judgment in favor of the appellants, and condemned the respondent to pay the sum demanded with costs. On appeal to the Court of Queen's Bench, that Court reversed the judgment of the Circuit Court, annulled the agreement in question, and dismissed the appellants' suit with costs.

From this decision, the present appeal is brought to her Majesty in Council. Chandler was the owner of five sixths of the Seignior of Nicolet, which adjoins the Seignior of La Baie. The southwest branch of the river Nicolet runs through these two Seigniories, and at the point where the dam in question stands; the whole channel of the river is within the Seignior of La Baie, but the shore or bank on the Nicolet side of the stream is within the Seignior of Nicolet. On the La Baie side of the river was a grist mill, called the Moulin de Despins, which was worked by means of water, diverted from the river by a chaussée or dam. This mill was what is termed a "Moulin banal," and had been built by the Seigniors of La Baie.

In the month of April, 1844, the mill, the dam, and all the rights belonging to the mill were purchased by the respondent and his brother, and conveyed to them accordingly. The purchasers, having taken possession, were desirous of extending and making alterations in the dam; by which the water of the river was diverted to their mill. Whether the old dam extended across the whole stream, or only across a part of it; whether there was to be an entirely new dam, or only a repair of the old one; whether the new work was to be on the old site, or the site was to be changed, are matters which were disputed at the bar, and with respect to which we are not able to arrive at any certain conclusion. But this is certain, that a very important change was to be made in the dam in one respect, that whereas the original dam was confined within the Seignior of La Baie, the new dam was to be extended into and supported, and rendered more effectual, by works carried into the Seignior of Nicolet. It was to be built for some depth into the opposite bank in the Island of La Fourche (which in this part of it, is within the Seignior of Nicolet), and flanked on each side by a quay. To do this, it was, of course, necessary to procure the consent of the proprietor of the land so to be encroached upon. Whether the consent of the Seignior of Nicolet was not also necessary, appears to us, for reasons which we will presently state, to admit of much doubt.

Amand Richard was proprietor of the land in question, deriving title under the lords of Nicolet; and on the 29th May, 1844. Amand Richard, by notarial deed, granted to Lavillée and his brother the right and privilege of

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building, constructing and erecting a quay or dam (the French words, in this part of the instrument, are "*quai ou chaussée*") on his land in the parish of Nicolet, opposite the mill called Moulin de Despins, in the Seigniorship of La Baie, and the right of digging out the land necessary to receive such quay and dam (the words here are *quai et chaussée*) to the depth of ten feet from the river, and to the length of fifty feet along the river. This grant is made to the Sieurs Lavallée, their heirs and assigns, to enjoy the land so occupied by the said quay and dam, "*comme bon leur semblera en toute propriété de ce jour à l'avenir*." The grant is stated to have been gratuitous, but whether gratuitous or for consideration is immaterial. The Lavallées proceeded to execute these works; and while they were engaged on them, they were served with two notices by a person named Creesé, professing to sign one notice as attorney for Chandler, the owner of five sixths of the Seigniorship of Nicolet, and the other as attorney of Madame Lozeau, the owner of the greater part of the Seigniorship of La Baie. Both these notices required the Lavallées to desist from the works which they were then erecting, as prejudicial to the rights of the Seigniors of La Baie and Nicolet. The notice of Madame Lozeau alleged that the Lavallées were building a dam, quays, and other constructions within the Seigniorship of La Baie at other places than those included in their grant. It does not appear that anything was done in consequence of the notice of Madame de Lozeau, and probably the allegations on which it rested turned out to be without foundation. The allegation of Chandler, and the rights set up by him, will be considered more conveniently when we deal with the objections made to the agreement. For the present purpose, it is sufficient to say, that his notice rested entirely on his rights as Seignior of Nicolet, and contained no mention of a deed which had been executed a few days before by Amand Richard. The notice was served on the 4th August, 1846. On the 27th July preceding, Chandler had procured a grant, which is called a retrocession, from Amand Richard, of a strip of land which would, as we understand it, include the strip already granted by him to the Lavallées. We are of opinion that Chandler, if the fact were material, must be held to have had notice of the Lavallée's grant. The object of the retrocession was, if possible, to defeat the grant. The grant to Chandler extended considerably further along the river, and considerably deeper from the river than Lavallée's, and would, therefore, include and surround it on the land side. In this state of things, Chandler insisted that he had a right, and alleged that he intended to build a mill on the land so obtained from Richard, and, by means of a canal, cut into the river above the dam of Lavallée's, to withdraw all the water from Lavallée's, and divert it to the mill which he so proposed to erect.

It was proved in evidence that though the mill was never built, nor, as far as appears, begun, the canal was dug to a certain depth, and that if it had been continued, as was threatened, to the depth of another foot, it would have withdrawn all the water from the respondent's dam, and left the channel of the river at that point dry. In this state of things, the agreement was made which is the foundation of the present dispute. It was made on the 21st May, 1847, between Chandler, described as Seignior proprietor, and possessor of five divided

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sixth parts of the fief and Seignior of Nicolet, and of the Isle de la Fourche, and rivers of the same, acting by Cressé, his attorney, of the one part, and the respondent, described as a lumber merchant, residing at the village of Berthier, in the district of Montreal, of the other part. It appears that the respondent had at this time acquired the share of his brother in the mill.

The agreement expresses that, in order to terminate amicably the disputes and differences which had arisen between the parties with respect to the dam in question, which is stated to "abut against the lot of land late of Amand Richard and now of Chandler," they have agreed to put an end to them by means of the present agreements and stipulations. Then Chandler agrees, on his part, to allow the said dam to remain as it is at present constructed and erected, so long as Lavallée shall see fit there to leave it, or to reconstruct and rebuild it; and Chandler promises not to interfere with the said dam, except it be to make use of the water to bring down timber and pass it over the said dam. Lavallée, on the other hand, agrees to pay to Chandler the sum of 30*l*. on the 11th day of the following month of November, and to continue to pay the same sum annually on the 11th November, so long as the said dam shall remain abutted upon the property of Chandler, in the aforesaid locality. In case of Lavallée ceasing to use the dam, the payment was to cease. It was further agreed between the parties, that Chandler should be at liberty to build one or more mills or manufactories, opposite to the said lot of land of Amand Richard or elsewhere, as he should see fit, except that he should not build any mill within a certain specified distance above or below the mill of Lavallée. Against the validity of this agreement, it is urged that Chandler gave no consideration for the benefit which he received under it; that he had no right whatever to interfere with the dam of the respondent, either in his character of Seigneur of Nicolet, or as purchaser from Richard; that the portion of the river Nicolet, across which the dam extended, was not within the lordship of Chandler; and that if it had been so, such circumstance would have conferred no right on the lord; and that as to the agreement not to build mills or manufactories within certain limits, such concession was worthless, for that no mill could have been advantageously built within those limits for want of water power. If by the deed in question, Chandler had professed to grant, and Lavallée had agreed to take, a lease of this dam, paying a rent of 30*l*. per annum as a consideration for it, it might have been argued that the consideration which he had agreed to give for the grant had wholly failed, if in fact Chandler had no rights to confer. But this is not the nature of the agreement; it is quite of a different character. It falls under the head of what in French Law is termed a "Transaction," and in English a compromise. It is an agreement to put an end to disputes, and to terminate and avoid litigation, and in such cases the consideration which each party receives is the settlement of the dispute; the real consideration is not the sacrifice of a right, but the abandonment of a claim. The French law, to which we must look for the decision of this case adopts the definition of the civil law and it is expressed by Domat, "*Des Transactions*", vol. 1, p. 341, in these words:—"La transaction est une convention entre deux ou plusieurs personnes, qui pour prévenir ou terminer un procès règlent leur différence de gré à gré de

la manière dont ils conviennent, et que chacun d'eux préfère, à l'espérance de gagner jointe au péril de perdre". It is no objection to the validity of such a compromise that the right was really in one of the parties only.

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If two persons claim adversely to each other the inheritance of a deceased person, and in order to avoid litigation agree to divide the inheritance between them, it is no ground for setting aside the agreement that one only was the heir, and that the other, therefore, gave up no right, which he really possessed. The consideration which Lavallée agreed to take for this grant was the abandonment by Chandler of all attempts to disturb him in the enjoyment of his mill and dam, and the agreement not to erect within certain limits new mills; and this consideration he actually received. There is, therefore, clearly no reason for annulling this agreement on the ground that Lavallée received no consideration for it. But it is said that an agreement of compromise, like any other agreement, may be set aside for what the French Law terms "dol," or want of good faith in either of the contracting parties; and it is alleged that Chandler, by his agent, was guilty of "dol," by misrepresentation of his title, and by using intimidation towards Lavallée. The misrepresentation imputed to him is that he claimed by his protest rights as Seigneur of Nicolet which did not belong to him, and treated as within his seignior a part of the river which was actually within the boundaries of La Baie; and it is contended, that as he had been for many years the owner of some portions of the Seignior of Nicolet, including La Fourche, and had resided within it, he could not have been ignorant either of the boundaries of his Seignior or of the rights which belonged to it; and that, therefore, if his claims were unfounded, he must have known them to be so at the time when he made them.

But the proceedings under the act for abolishing feudal tenures in Canada show that upon both these points he might be honestly mistaken. With respect to the boundaries of Seigniories, it appears that when this part of Canada was settled by the French Government about the year 1680, the country was waste and uncultivated, and for the most part covered with woods, and that any very precise description of boundaries was scarcely possible; that the plan of settlement adopted was to grant a large plot of land to some person as Seigneur, in order that he might grant it out to tenants or "censitaires" for the purpose of cultivation. The grant of the Seignior of La Baie describes the boundary on one side as two leagues in a forest, to be measured from the Lake St. Pierre, with the isles, islets and meadows, which might be met with in that space, and it is by means of this measurement that it is made out that this Seignior at the place in question includes the whole channel of the river, though the shore bounding it on the side of Nicolet is within that lordship. It might well, therefore, when the notice was given, be a matter of doubt whether the whole or part of the stream was not also within that lordship though at the trial of the cause the fact had been ascertained, and was admitted to be otherwise. The fact itself was not, perhaps, of any great importance, for the diversion of a stream running through several Seigniories, could not be justified simply by the circumstance that the particular place at which the diversion was made belonged to only one seignior. On referring to the

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maps of Canada, it appears that the Nicolet is a very large river divided by the Isle La Fourche into two branches, of which the south west branch must run through many Seigniories besides that of La Baie, and certainly runs along, and probably in part of its course entirely within the Seignior of Nicolet. But the fact (whether material or not) was made out by the title deeds of the respondent; he had, therefore, at least equal means of knowing it with Chandler, and there is no more reason for imputing actual knowledge to Chandler than to him. As to the general feudal rights of the Seigniors; when they were abolished by an act of the legislature in 1854, a commission, consisting of all the judges, was appointed for the purpose of determining questions which might arise with respect to them. A very large proportion of those questions appears by the proceedings to have related to the rights of the seigniors in non-navigable streams and waters within their seigniories. They insisted that, notwithstanding the grant of the lands by them to their tenants or "censitaires," they still retained the property in all these waters, and a right to the exclusive use of them for the purposes of mills and manufacturies. This claim was not allowed by the commissioners, though it seems to have been in some instances recognized by judicial decision. With respect to mills, it appears that each seignior was bound by law to build a grist mill within his seignior for the use of his tenants; that the tenants were bound to resort to such mill; and that no person, except the lord, was at liberty to build a mill of the same description within the seignior. These mills were called "*moulins banaux*;" and if a mill of the same kind were erected within his seignior by any other person, the lord had the right to demand its demolition. He also claimed the right of taking back from any "censitaire" a portion of the land included in his grant for the purpose of erecting such mill, making a reasonable compensation. Whether this last claim was well founded or not does not appear to have been decided by the judges under the commission; but it is submitted as a proposition of law by the attorney general. Now, Chandler's protest is quite in conformity with these claims. He insists that, in his character of seignior of Nicolet, and a Fourche, he is entitled to all non-navigable streams within the seignior, and to the exclusive right of building mills and manufactories of all kinds within the same; and he alleges that the proceedings of Lavallee in erecting the dam and quay within his seignior were an infringement of his rights. It may admit of doubt whether Chandler's claim to interfere with the works of Lavallee's mill within his (Chandler's) seignior was without foundation.

If the lord had a right to prevent the erection of any grist mill within the lordship, on the ground that it might interfere with the custom due to his own mill, there seems room for argument that he might prevent the erection within his seignior of a mill of that description, which might be equally injurious to him, though the main building was situate within the limits of an adjoining seignior. The question, however, is not whether Chandler could have sustained his claim, but whether it was so unreasonable that it could not have been advanced *bonâ fide*; and we certainly cannot come to that conclusion. It is mentioned in his protest that he had served a notice of claims to the same effect in the year 1826, on the Despins, the then owners of the mill. We feel

bound to say that we can discover nothing in this case to support the charge of wilful misrepresentation by Chandler, nor can we find any sufficient evidence of surprise or intimidation of the respondent. Many months intervened between the service of the protest and the agreement, and there is nothing to show that the respondent was in any manner under the control or influence of Chandler, or in such circumstances or condition of life as to be subject to intimidation by him.

The retrocession obtained from Richard, and the threat by Chandler to build a mill in the Seigniorship of Nicolet, are in a great measure explained by the state of the law, to which we have adverted, at the date of the agreement; and we think that the engagement by Chandler not to build any mill within certain limits was a substantial concession by him.

If, therefore, the transaction were recent and had not been the subject of former discussion, we must hold upon his evidence that the charge of "dol" brought against Chandler had not been substantiated; but it must be remembered that, for some time after the agreement was made, it was acted upon by both parties; that its validity was first disputed in 1852, when Chandler was dead, though Cressé seems to have been living; that the grounds on which its validity was then disputed were the same with those laid in the present suit; that the case was decided against the respondent; and that he acquiesced in the decision. When the present suit was brought, Cressé as well as Chandler was dead. Under such circumstances, every presumption is to be made in favor of parties whose conduct is impeached after the death of both, and when all the explanations which might be desirable can no longer be afforded. It remains to consider the objection of error in the "*motif déterminant*" of the agreement. Error on the part of the respondent is alleged generally both as to matter of fact and of law. In what circumstances error will be a ground for setting aside or refusing to act upon an agreement generally, and an agreement of compromise in particular, and what the nature and effect of the error must be, seems to have perplexed alike judges in England and foreign jurists. The question here is to be determined exclusively by the French law, as it is applicable to compromises or transactions. The rule, as we collect it from the numerous authorities cited in the argument, appears to be this:—If the error relied on, be in a matter of fact, and the fact be one not included in the compromise, and of such a character that it must be considered the determining motive of either of the parties in entering into the agreement, its existence is regarded as a condition implied, though not expressed; and then if the fact fail, the foundation of the agreement fails. This seems to be the meaning of the language used by Toullier, b. 3. tit. 3. s. 42, and following articles. The instances which he puts are: if a compromise be founded on the genuineness of instruments which turn out to be forged; or if a suit, which it is the object of a compromise to determine, turns out to have been already decided in favor of one of the parties; or if a compromise be founded upon a will which turns out to have been revoked by another will of which the parties are ignorant. But he says, when the compromise is general of all matters in difference between the parties, then the rule of law is different, because it is not proved that the

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compromise would not have taken place although the parties had known that one of the points was not doubtful.

In such a case it is neither proved nor presumed that the compromise would not have taken place; and in case of doubt, "erreur ne nuit qu'à celui qui était dans l'ignorance." The general rule then applies, "Error nocet erranti." We cannot say that in this case any mistake of fact has been proved on the part of the respondent, which, if it had been known, would have prevented the agreement. It is neither proved that Lavallée believed the part in question of the river Nicolet to be within the Seigniorship of Chandler, nor that if he had known it to be within the Seigniorship of La Baie, he would not have entered into the compromise. It appears to us to have been the intention of the parties to come to a general settlement of all the matters in dispute between them, without resorting to litigation in order to determine the various points of fact or of law upon which their rights might depend. As to the effect of error in law upon agreements of this description, art. 2052 of the Code Civil provides, "Les transactions ont entre les parties l'autorité de la chose jugée en dernier ressort. Elles ne peuvent être attaquées pour cause d'erreur de droit ni pour cause de lésion." This article in itself, of course, has no force in Canada but it is merely an embodiment of the ancient law of France, as is clear from the chapter in Domat's Civil Law, tit. "Des Transactions," and as is expressly stated by Merlin in the passage relied on by the respondent in the Répertoire, tit. "Transaction" sect. 5, art. 2, vol. 34, p. 371, he says:—"L'erreur de droit ne peut jamais servir de prétexte de faire rescinder une transaction. Les anciennes lois l'avaient décidé, et l'article 2052 du Code Civil dit expressément que 'les transactions ne peuvent être attaquées pour cause d'erreur de droit.'" As a general rule, this is not denied by the respondent. But he contends that there is an exception where a mistake has prevailed generally with respect to the law affecting whole classes of the community, and a compromise has been made founded upon such mistake. And it is said, that at the time when this agreement was made, the rights of the Seigniors, with respect to non-navigable rivers and other waters within their seigniorships were universally considered to be much larger than they were afterwards found to be by the proceedings under the commission to which we have already referred, and that this mistake was the foundation of the agreement. In support of the proposition of law, a passage is referred to in Merlin's Répertoire, immediately following that which we have just read, and which is in these words:—"Si cependant l'erreur de droit avait été tellement générale que le législateur se fut cru obligé non seulement de la faire cesser par une déclaration de sa volonté, mais encore de relever ceux qui l'auraient commise de tous les acquiescements auxquels elle aurait pu les entraîner, la transaction qui aurait été la suite d'une pareille erreur serait incontestablement nulle. C'est ce qu'a jugé un Arrêt du 24 Mars, 1807, rapporté au mot Communaux, s. 4." It is obvious, that if an act of legislation, correcting a mistake generally prevailing as to the law on a particular subject, at the same time expressly relieves parties who have acted on the mistake from the consequences of their acts, there is no question for a judge to decide; and this is the case stated by Merlin. It is true that the arrêt to which he refers states.

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merely that the party was not bound by acquiescence in a decree arbitral, "puisque l'opinion générale était alors que les décisions d'arbitres forcés n'étaient point attaques par cette voie," that is, by way of cessation. Neither the general rule nor the particular case (of which the circumstances were very peculiar, and founded on the laws enacted by the revolutionary Government of France in the years 1792 and 1793, in favor of the peasants against their lords) goes the length of establishing the principle contended for by the respondent, that a mistake of Law as to rights of different classes prevailing generally at the time of a "transaction," is sufficient to annul a contract founded upon such mistake. Whether under any circumstances it would be sufficient to do so it is unnecessary for us to consider, because on referring to the proceedings, we are satisfied that the facts of this case afford no ground for any such question. On the contrary, a careful examination of these proceedings as they are stated in the Lower Canada Reports, with which we have been furnished, convinces us that at the date of this compromise very great doubt prevailed as to the rights of the lords and their tenants respectively to the ownership and the use of non-navigable rivers, and as to the right to erect mills, and by means of dams to divert the water to such mills; and that there was no general recognition of the rights claimed by the lords. The thirteenth question put to the commissioners was in these words:—*What was the jurisprudence followed in Lower Canada since the cession of the country in relation to the various rights claimed by Seigniors in the waters which pass through, or border upon, the lands comprised in their respective "censives?"* The legal proposition submitted on the part of the Crown was, "that although several judgments favorable to the pretensions of the Seigniors on the matter have been pronounced, they are not such as the law requires to establish a jurisprudence;" and the opinion of the Court is, "that there has been no established jurisprudence in Lower Canada since the cession in relation to the right in the waters which pass through or border upon the lands." There is no ground, therefore, in this case for any exception to the general rule, that an agreement of compromise is not vitiated by a mistake of either party in matters of law. Upon the whole, we have come to the conclusion that the judgment of the Court below cannot be supported; that this agreement is to be dealt with upon the principles applied by French law to "Transactions;" that the withdrawal of the claim of Chandler to interfere with the dam, and the engagement to limit his right of building mills, constituted a sufficient consideration to support the agreement, and that no such proof has been given, either of "dol" or "erreur," as would authorize a Court of justice to annul it. We must humbly advise her Majesty to reverse the judgment complained of, and to restore the judgment of the Circuit Court; and we think that the appellants must have the costs in the Queen's Bench, and of this appeal. As this case is to be decided exclusively by the French law we have forbore to advert to the English authorities upon the subject. But we may observe that in the case of *Stewart vs. Stewart* (6 Cl. and Fin. 911), in the House of Lords, which was a case from Scotland, a very careful examination took place of the principles to be applied to this subject; and Lord Cottenham came to the conclusion that the rules of the civil law had been, in effect, adopted into

Brodie et ux. the law both of England and Scotland; and this appears to have been the case
vs. with the law of France.
Cowan.

W. E. B.

SUPERIOR COURT.

MONTREAL, 4TH. MAY, 1862.

Coram DAY, J., VANFELSON, J., MONDELET, J.,

No. 1224.

Brodie et ux. vs. Cowan.

HOLD:—1. That in the absence of proof of the laws of the place where parties had their domicile when they were married out of Lower Canada; the Court cannot take notice of or be governed by any other laws than those in force in Lower Canada in deciding upon the matrimonial rights of the parties.

2. That Experts have no right of naming a third expert before proceeding and before any disagreement has taken place.

The Plaintiffs in their declaration set out the following facts: that on or about the eleventh day of February, one thousand eight hundred and ten, the said late John Boyd, then resident in the Parish of Bath in Paisley, Scotland, to wit, that part of the United Kingdom of Great Britain and Ireland, called Scotland, and Jean Barclay otherwise called Jane Barclay, Spinster, then resident at Bath aforesaid were lawfully united in marriage.

That of the said marriage there was issue one child, to wit, Jean Boyd otherwise called Jane Boyd born at Bath aforesaid, on or about the twenty-eighth day of July, one thousand eight hundred and eighteen, still living, being now the wife of the said Robert Brodie and one of the Plaintiffs in this cause.

That the said marriage was not preceded or accompanied by any contract of marriage; and that by the laws of Scotland aforesaid as well as by the laws of that part of this Province, heretofore called Lower Canada; where the parties afterwards resided as hereinafter mentioned, a communion of property, *communauté de biens* was created and did from thenceforth subsist between the said John Boyd and the said Jean Barclay otherwise called Jane Barclay.

That soon after the aforesaid marriage, the said John Boyd and Jean Barclay his wife emigrated to and settled in that part of this Province of Canada heretofore called Lower Canada, where they continued to reside up to the time of their decease respectively.

That in Lower Canada aforesaid, the said late John Boyd and Jean Barclay acquired considerable property and estate as well moveable as immoveable of great value, to wit, of the value of one thousand pounds and upwards, which by law appertained to the communion of property, *communauté de biens* subsisting between them.

That on or about the seventh day of November one thousand eight hundred and thirty-nine, the said Jean Barclay, otherwise called Jane Barclay, died at South Georgetown aforesaid.

That at the time of the decease of the said late Jean Barclay, otherwise called Jane Barclay, there was considerable property and estate, as well

moveable as immovable, of great value to wit: of the value of one thousand pounds and upwards appertaining to the communion of property, *communauté de biens* which had subsisted between her and the said John Boyd.

The Defendant by his first plea alleged the following facts:—That by reason of the marriage of the said John Boyd and the said Jane Barclay in Scotland, where the matrimonial domicile of the parties existed, the rights of the said Jane Barclay in the immovable property, referred to in Plaintiff's declaration acquired as aforesaid, were fixed and must now by this Court be determined according to the law of Scotland, to wit, of the said matrimonial domicile of the said parties; and the Defendant alleges that the communion of property, *communauté de biens*, existing in Scotland, does not by the law of Scotland extend to or include, and cannot be construed to include real property of any description acquired subsequent to marriage, and does not extend to the real property acquired in Lower Canada by the said parties and that the community of property, as known in Lower Canada, does not by law extend to give to the said Jane Barclay or to the said Jane Boyd as heir to her said mother, any other or greater rights than would be granted by the Law of Scotland and does not extend to or effect real property which was acquired in Lower Canada in manner as stated in Plaintiff's declaration. And the said Defendant alleges that all the real property, lands, and tenements at any time acquired or possessed by the said late John Boyd in Lower Canada, or by the said Jane Barclay, or which are now or any time have been in the possession of the said Defendant, were so acquired after many years' residence in Scotland by the said John Boyd and the said Jane Barclay, after their marriage and their removal to Lower Canada aforesaid.

That by reason of the premises the said Jane Boyd, Plaintiff, cannot by law, as heir of her said mother, demand any portion of the immovable property acquired as aforesaid and possessed by the said John Boyd at the death of the said Jane Barclay, and that the said John Boyd; at the decease of the said Jane Barclay, was not then, nor is the said Defendant liable to account for the said real property to the said Jane Boyd or to the said Plaintiff.

No proof was made of what the law of Scotland was with reference to the matrimonial rights of the parties.

Per Curiam.—The Defendant contends that the marriage having taken place in Scotland, the matrimonial rights were regulated by the law of that country, and that in that law there was no community. There is no doubt of the general principle which had been established in the case of *Rogers vs. Rogers* (1) that the matrimonial domicile regulated the matrimonial rights, but the difficulty here is that there is no evidence of what the law of Scotland is.

The rule then that applies is: that in the absence of proof, the Court will presume the law of a foreign country to be the same as its own—taking then, the matrimonial rights of the parties to be governed by the law of Canada, the Defendant must be ordered to render an account as to the succession.

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The judgment is *motivé* as follows :—

The Court, having heard the parties by their Counsel, examined the proceedings and proof of Record, and having deliberated thereon, considering that the Plaintiff hath established the material allegations of her declaration in so far as the same relate, to the estate and succession of Jane Barclay ; her mother, and that by reason of the marriage of the late John Boyd, her father, with the said Jane Barclay, and that by the laws in force in that part of the Province of Canada heretofore called Lower Canada, a community was created, and subsisted between the said John Boyd and Jane Barclay, and further considering that the Defendant hath failed to prove that the laws in force in Scotland, where the said John Boyd and Jane Barclay at the time of their said marriage had their domicile, and were married, were other than different from the said laws in force in the said Province of Lower Canada ; and that in the absence of such evidence the Court now here cannot take notice of or be governed by any other laws than those in force in the said Province of Lower Canada, in deciding upon the matrimonial rights of the said late Jane Barclay and the present claim and demand of the Plaintiff ; Dismissing the exceptions of the Defendant in so far as the same relate, to the said community of property and the estate and succession of the said Jane Barclay—doth order and adjudge that the Defendant as well in her own name as in her said capacity of tutrix, do within one month from service upon her of this judgment render a just and true account of the property and estate as well moveable as well immoveable in her possession as aforesaid pertaining to the said communion of property heretofore subsisting between the said late John Boyd and the said late Jean Barclay otherwise called Jane Barclay as well as all the rents, revenues, issues, and profits of the aforesaid communion of property with costs ; reserving to adjudge upon the other conclusions relating to the estate of the said Jane Barclay.

On the 17th September 1863, upon motion of the Defendant, the Report of the Experts was set aside for the reasons set forth in the judgment rendered as follows :—

The Court having heard the said parties on the Defendant's motion founded upon affidavit to have the report of the *Experts* made and filed in this cause, set aside for the causes stated in said motion, and having maturely examined the said report and maturely deliberated thereon, considering that no legal and valid notice was given to the Defendant to attend upon and before the said *Experts* and further that the said *Experts* named in the said cause by and in virtue of the rule of this Court of the 1st day of March last, assumed the right of naming a third Expert before proceeding to the execution of said rule, and before any disagreement could have taken place touching and concerning any of the matters in dispute by and between the parties, doth order that the said Report and the same be set aside as prayed for with costs of the motion only.

Smith & Cross, Attorneys for Plaintiffs.

A. & G. Robertson, Attorneys for Defendant.

(P. H. L.)

COUR DU BANC DE LA REINE.

EN APPEL.

1^{ER} SEPTEMBRE 1862.

Coram SIR L. H. LAFONTAINE, J. C., AYLWIN, J., DUVAL, J., MEREDITH, J.,
MONDELET, J.

GAUTHIER DIT ST. GERMAIN,

Défendeur en Cour Inférieure, Appellant.

vs.

GLODUE.

Demandeur en Cour Inférieure, Intimé.

Jugé:—Qu'un propriétaire d'un immeuble indivis, ne peut pas porter l'action pétitoire contre son co-propriétaire.

Mr. le Juge en Chef Lafontaine, en rendant jugement pour la Cour, s'est prononcé dans les termes suivants:

Action pétitoire, intentée dans la Cour Supérieure, siégeant dans le District de Shefford, le 30 août 1860, signifiée le 1^{er} septembre, par laquelle le Demandeur, revendique le lot No. 2, dans la 6^{me} concession du Township de Roxton, à lui vendu, sous l'autorité de la municipalité du Comté de Shefford, le 1^{er} Février, 1858, pour défaut de paiement de taxes municipales. Le titre de cette vente a été donné par le secrétaire-trésorier de la municipalité, le 28 sept. 1859. Prix d'adjudication, £2 10s. 10d.

Le Défendeur a présenté deux exceptions, dans lesquelles il admet la vente et les formalités qui l'ont précédée, mais en déclarant qu'il était convenu avec le Demandeur qu'il aurait la moitié, et que pour obtenir la terre au plus bas prix possible, il s'abstiendrait d'enchérir.

Depuis, il a obtenu la permission d'amender ses exceptions, et l'amendement consiste dans l'allégation, que la susdite convention eût lieu, non avec lui, mais avec le nommé Jérémie Bachant, dont il a acquis les droits, par acte du 27 juin 1859.

Nonobstant l'amendement, on a laissé subsister l'articulation de faits du Défendeur, bien qu'elle ne s'applique pas au changement survenu dans la contestation liée entre les parties.

Le Défendeur a examiné deux fois le Demandeur sur faits et articles, d'abord avant l'amendement, puis après l'amendement. Toute la preuve du Défendeur consiste dans les réponses du Demandeur, aux interrogatoires sur faits et articles proposés en dernier lieu.

L'Appellant souleva, dans son factum, des questions que la contestation, telle que liée entre les parties, ne présente pas, et que les réponses sur faits et articles repoussent. Je veux parler de prétendues formalités que, selon le factum, il était nécessaire d'alléguer comme ayant été observées avant la vente.

D'un autre côté, le Demandeur a admis dans les réponses sur faits et articles, que Bachant avait acheté avec lui, avait payé la moitié du prix d'adjudication, et devait avoir une moitié de la terre, et le Défendeur est maintenant aux droits

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de Bachant. Dans ces circonstances, je ne pense pas que l'action puisse se maintenir.

De plus, le Demendeur, dans sa réponse au 15^{me} interrogatoire, fait l'aveu qu'il a vendu le lot de terre au nommé Roy. Il n'est donc pas fondé à en revendiquer la propriété. Par conséquent, il n'a pas le droit d'exercer l'action pétitoire.

MR. LE JUGE DUVAL :—Je concours dans le jugement de la Cour, pour les raisons énoncées dans la troisième page du factum de l'avocat de l'Appelant. Ces raisons sont les suivantes :

L'Appelant a plaidé en Cour Inférieure que par promesse de vente intervenue le jour de l'adjudication et par conséquent avant la vente au nommé Roy, l'Intimé avait vendu la partie du lot de terre réclamé à un nommé Jérémie Bachand ; que ce dernier l'avait revendue, de même que tous ses droits et privilèges, à l'Appelant en cette cause, par acte de vente notarié en date du 26 Juin 1859, et produit dans la cause ; qu'en conséquence, c'était l'Appelant qui, à l'époque de l'institution de l'action, était le vrai propriétaire du morçeau de terre, et lui seul.

L'Appelant n'avait pas d'autre moyen d'établir cette promesse de vente que de s'en rapporter au serment du Demendeur.

Etant demandé à l'Intimé au 6^e Interrogatoire s'il est vrai, "que pour prévenir la concurrence entre vous et le dit Jérémie Bachand, et dans le but d'empêcher les enchères de monter à un prix trop élevé, il fut convenu là et alors, et immédiatement avant la dite vente, entre vous et le dit Jérémie Bachand, que le dit lot de terre serait adjugé pour une somme suffisante, ou à peu près, pour payer le montant des dites taxes et cotisations et des frais, et que vous auriez la moitié du dit lot, et le dit Bachand aurait l'autre moitié, en payant chacun une moitié égale du prix d'adjudication ;" il répond, "Yes."—Puis, au huitième interrogatoire, il avoue que le prix de l'adjudication fut payé par moitié par le dit Jérémie Bachand, conformément à leur arrangement.—Enfin, au dixième interrogatoire, il ajoute qu'il promit là et alors un bon titre à Mr. Bachand, mais qu'il devait avoir le choix sur chacune des deux moitiés.—"I was to give him a title for a half, dit-il, but I was to have the first choice."

Et en explication de ces mots au juge, "I was to have the first choice," il dit : "I had the right to make the first choice ; but the lot not having been surveyed and chained, I did not do so, I had the first choice, but I don't remember having said to Bachand that I would rather have the other half of the lot, that is the half not adjoining the number one as above mentioned."

L'Appelant soutient humblement que cette addition, "I was to have the first choice," doit être considérée comme non avenue. Pourquoi l'Intimé n'a-t-il pas parlé de ce prétendu choix dans ses réponses aux exceptions de l'Appelant ? Il ne l'a pas fait et n'a pas même produit de réponse ni spéciale ni générale ; et ce que la Cour pourrait tout au plus supposer en pareil cas dans la bouche de Mr. Gloëue, se résumerait à ceci : "Je n'ai jamais promis de titre à Bachand, et je ne lui en dois aucun." Mais voilà que dans la plaidoirie, et lorsque le Défendeur avait toute raison de ne pas s'y attendre, le Demendeur déclare qu'en effet il a promis un titre ; mais qu'il devait avoir le premier choix.

La Cour peut-elle admettre de semblables additions, ou plutôt cette réponse à l'exception du Défendeur, si toutefois c'en est une ; la pratique n'est-elle pas de les éliminer ?

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Mais, du reste, cela ne change pas beaucoup la position de Mr. Glodue. Il n'a pas voulu faire son choix, "the lot not having been surveyed and chained," et c'est précisément ce qu'il aurait dû faire, avant de prendre son action. Au lieu de poursuivre au pétitoire, n'aurait-il pas dû obtenir le partage de la propriété entre lui et le nommé Bachand, le cédant de l'Appelant ? N'aurait-il pas dû également exercer son choix et le faire connaître à son co-propriétaire par indivis ?

D'ailleurs, le seul fait qu'à l'institution de l'action, Mr. Glodue n'était avec l'Appelant ou son auteur Bachand que co-propriétaire par indivis du lot revendiqué et de tout le lot No. 2, n'est-il pas suffisant pour détruire l'action du Demandeur ; "Le domaine de propriété, dit Pothier, est ainsi appelé parce que c'est le droit par lequel une chose *m'est propre*, et m'appartient primitivement à tous autres." Plus loin, il ajoute :—"Si on suppose qu'un autre que moi soit propriétaire d'une chose dont je suis propriétaire, dès lors cette chose est *commune entre nous*, et si elle est commune, on ne peut plus dire qu'elle me soit propre pour le total ; car *propre* et *commun* sont deux choses contradictoires." Et plus loin, ... "Car ce droit de propriété qu'ils ont en commun est le droit par lequel la chose leur appartient en commun primitivement à tous autres ; et entr'eux la part que *chacun y a lui appartient* à lui seul primitivement, même à ces co-propriétaires ; car la part que l'un a dans la chose commune n'est pas la part de l'autre, et chacun n'a le droit que de disposer de sa part." "Ce ne sont pas des parts réelles qui ne peuvent être formées que par la division de la chose, ce sont des parts intellectuelles."—Pothier, Traité de la Propriété, 1er Partie, ch. 1er, nos. 4, 16, et 17. Voir aussi Pothier sur l'action de revendication, *ibid.* 2e partie, ch. 1.

Et cependant l'Intimé admet lui-même qu'il n'est que co-propriétaire de tout le lot No. 2, qu'il n'a jamais été partagé et que l'Appelant ou son auteur a aussi la propriété sur la chose réclamée. Comment Mr. Glodue pourrait-il le déclarer propriétaire de la moitié de ce lot ? Comment l'Appelant pouvait-il être condamné à l'abandonner, lorsqu'elle n'est pas refusée, et que l'Intimé n'a aucun titre ? Encore une fois, Mr. Glodue aurait dû provoquer à partage avant d'en venir au pétitoire.

Voici le jugement de la Cour :—

La Cour considérant que l'Intimé Demandeur en Cour Inférieure, par ses réponses aux interrogatoires sur faits et articles, à lui soumis, a reconnu que la terre par lui réclamée en cette cause a été acquise par lui à condition que la moitié d'icelle serait la propriété du nommé Bachand, et que le dit Bachand a payé sa part du prix d'acquisition, considérant que le dit Intimé par ses dites réponses reconnaît qu'il devait faire option de la moitié, qu'il prendrait pour sa part, et que lors de l'institution de la présente action, l'Intimé n'avait pas déclaré son option, et qu'à défaut de cette option déclarée, l'Intimé ne peut être reconnu le propriétaire de la dite terre ou d'aucune portion d'icelle, et qu'en conséquence

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dans le jugement de la Cour Supérieure, qui a maintenu l'action du Demandeur il y a mal jugé.—Infirmé etc.

D. Girouard, Avocat de l'Appelant.

O'Halloran & Baker, Avocats de l'Intimé.

(P. R. L.)

COUR DU BANC DE LA REINE.

MONTREAL, 23 AVRIL, 1849.

Coram Rolland, C. J., Day, J., J. Smith, J.

No. 2541.

Ladieur vs. *Donegani*, et al,

ENREGISTREMENT—RATIFICATION DE TITRE.

Jugé :—1o. Que dans le cas de fraude de la part du débiteur, résultant du changement de l'un de ses prénoms dans un acte translatif de propriété subséquent à son obligation créative d'une hypothèque, la perte de la créance hypothécaire, quoique enregistrée doit retomber sur le créancier et non pas sur le tiers-détenteur qui ne doit pas être la victime de cette fraude :—2o. que sans aucune opposition de la part du créancier hypothécaire, ne saurait détruire le droit d'action déjà acquis et en exercice, vu que le tiers-détenteur avait une connaissance suffisante de cette hypothèque avant cette demande en ratification de titre.

Le Demandeur poursuit les Défendeurs, en déclaration d'hypothèque, pour le montant d'une obligation qui lui avait été consentie le 26 Mai 1829, par JEAN Olivier Danis et sa femme, M^{re}. Chevreuil, N.P., et enregistrée le 30 Octobre, 1844.—Le Demandeur alléguait que dans l'acte de vente de la propriété qui lui était hypothéquée par l'effet de cette obligation comportant une hypothèque générale sur tous les biens du débiteur, reçu le 30 Septembre, 1846, M^{re}. Doucet, N.P., et que son débiteur avait consenti sous le nom de JOSEPH Olivier Danis aux Défendeurs, c'était par dol et fraude, qu'il s'était appelé, Joseph Olivier Danis au lieu de Jean Olivier Danis, de même que c'était par dol et fraude qu'il avait acquis cette propriété sous le même nom de Joseph Olivier Danis, au lieu de Jean Olivier Danis, le 2 Juillet, 1840, de Joseph Papineau, M^{re}. Trudeau, N.P.

Les Défendeurs plaidèrent à cette action une exception péremptoire par laquelle ils alléguaient : que par l'acte du 30 Septembre, 1846, ils avaient acquis de bonne foi de Joseph Olivier Danis, notoirement connu sous ce nom, l'immeuble prétendu hypothéqué en faveur du demandeur et qu'ils en étaient en conséquence devenus possesseurs de bonne foi et qu'ils avaient payé et acquitté de bonne foi le prix de leur acquisition en exécution du dit acte.—Que lors de leur acquisition, le Demandeur n'avait aucune hypothèque régulièrement et légalement inscrite et enregistrée contre le dit JOSEPH Olivier Danis, le vendeur des Défendeurs. Que l'inscription ou l'enregistrement d'aucune hypothèque consentie au Demandeur, par le nommé Jean Olivier Danis et sa femme, ne pouvaient valoir et n'avait aucune force légale vis-à-vis des Défendeurs comme acquéreurs et détenteurs de cet immeuble acquis par eux de Joseph Olivier

Danis. Qu'en supposant que le Demandeur fut victime, ainsi qu'il alléguait, d'une fraude commise à son égard, par le nommé Jean Olivier Danis, il ne pouvait avoir aucun recours contre les Défendeurs, ignorants et non participants de cette fraude. Durant le cours de l'instance les Défendeurs ayant obtenu une sentence ou jugement de ratification de leur titre, savoir : l'acte de vente du 30 Septembre 1846, firent la motion suivante : qu'attendu l'obtention pour eux d'une sentence de ratification de l'acquisition par eux faite, de Joseph Olivier Danis des immeubles et dépendances à raison desquels ils sont poursuivis et troublés hypothécairement par suite de la présente action du Demandeur, la dite sentence obtenue depuis l'institution de cette action, et depuis la production des exceptions et défenses du Défendeur, et nommément le ou vers le trente-et-un Janvier, mil huit cent quarante-huit, attendu aussi le défaut par le dit Demandeur de s'être opposé à la dite demande et sentence de ratification à raison de ses prétendus droits d'hypothèque, il soit permis aux Défendeurs de plaider de nouveau et de produire et filer en cette cause les exceptions et défenses accompagnant les présentes, basées sur la dite sentence et confirmation de titre, et qu'aussi si besoin est, l'enquête sur cette cause soit réouverte à toutes fins que de droit.

Les défenses additionnelles sont comme suit. Et les dits Défendeurs, sans préjudice aux Défenses et Exceptions par eux plaidées en cette cause pour Exceptions ou défenses additionnelles à icelles par eux déjà plaidées dont ils se réservent tout l'avantage, disent qu'en supposant que le dit Demandeur lors de l'institution de cette action eut l'hypothèque ou les droits d'hypothèque qu'il réclame sur les dits immeubles ou dépendances acquis par les dits Défendeurs de leur dit vendeur, Joseph Olivier Danis, chose que n'admettent point les Défendeurs, icelle hypothèque ou iceux droits d'hypothèque que le Demandeur prétend avoir pour le recouvrement de la somme en capital intérêt et dépens qu'il réclame seraient devenus éteints et purgés à toutes fins que de droit en conséquence et en vertu d'une sentence ou d'un jugement de ratification obtenu par les Défendeurs le trente-et-un Janvier, mil huit-cent quarante-huit (31 Janvier, 1848), depuis l'institution de cette action de l'achat ou de l'acquisition faite par les dits Défendeurs du dit Joseph Olivier Danis, en vertu du dit acte du trente Septembre, mil huit cent quarante-six, (30 Sept. 1846) devant le dit M^{re}. Doucet et son confrère Notaires, ainsi qu'il en en appert par la dite sentence ou jugement de confirmation dont les Défendeurs ont produit copie authentique, lors de leur Enquête, que le dit Demandeur aurait dû dans le cas où il en eût eu le droit, s'opposer à la dite confirmation de titre ou sentence de ratification à raison des prétendus droits et hypothèques qu'il réclame pour le recouvrement de sa dite créance en capital intérêt et dépens ; que le Demandeur n'ayant produit aucune opposition à la dite sentence de ratification il serait devenu déchu de tous les droits d'hypothèque qu'il avait pu avoir sur les dits immeubles acquis par les dits Défendeurs du dit Joseph Olivier Danis, qui en conséquence de la dite confirmation de titre et de ce que dessus allégué et en supposant que le dit débiteur du Demandeur, c'est-à-dire, Jean Olivier Danis fut le même individu que le dit Joseph Olivier Danis le vendeur des Défendeurs, chose que n'admettent point les Défendeurs, les dits immeubles acquis par les dits Défendeurs étant devenus dégrévés et purgés

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d'aucune hypothèque qui aurait pu exister sur les dits immeubles acquis par les dits Défendeurs, la dite action du Demandeur ne peut se maintenir contre les Défendeurs.

Pourquoi les dits Défendeurs concluent à ce que dans le cas où le Demandeur se trouverait avoir eu et en supposant qu'il ait jamais eu des droits d'hypothèque pour le paiement de la dite créance en capital, intérêt et dépens sur les dits immeubles acquis par les dits Défendeurs, il soit prononcé et adjugé qu'iceux droits d'hypothèque ou icelles hypothèques, s'ils ont jamais existé sont devenus éteints et purgés en conséquence du dit jugement de ratification et que partant la dite action du Demandeur soit renvoyé avec dépens.

Cette motion pour plaider ce fait de purge d'après les derniers errements, puis *darrein continuance*; fut rejetée en Janvier 1849, *Coram* Day, J. Smith, J. : 1o. pour la raison qu'ils s'était écoulé près d'un an depuis ce fait de purge et la production de cette motion et que diligence doit être faite pour produire une telle défense; 2o. parceque le Demandeur n'était pas obligé de s'opposer à cette demande en ratification de titre, vu que par son action en déclaration d'hypothèque, les Défendeurs étaient suffisamment mis en demeure et avaient connaissance de cette hypothèque, dans le cas où elle serait légalement inscrite ou enregistrée; *Vide*—Guyot—Rép. : vs. hypothèque pages 677, 678, 679, etc. 1 vol. Troplong, priv. : and hyp. no : 665—Revue de Wolowski, 1856, Tome 9 : 2me. partie, p. 113.

Après audition au mérite, la Cour par un jugement final rendu le vingt trois Avril, mil huit cent quarante-neuf (23 Avril 1849) a débouté le Demandeur des conclusions de son action hypothécaire; ce jugement est motivé comme suit : La Cour, après avoir entendu les parties par leurs Avocats, examiné la procédure, pièces produites et preuve et en avoir délibéré; considérant que l'enregistrement de l'obligation du nommé Jean Olivier Danis, n'a pas eu l'effet de créer une hypothèque sur l'immeuble acheté de bonne foi par les Défendeurs d'un nommé Joseph Olivier Danis, sans qu'ils puissent connaître l'existence d'aucune hypothèque, que d'ailleurs le vrai nom du dit Danis n'est pas établi d'une manière certaine, que l'erreur dans le nom peut être dans l'obligation même; que comme de la fraude du dit Danis quelqu'un doit souffrir, il serait injuste que la perte tombât sur les Défendeurs dont la cause est plus favorable que celle du Demandeur, a débouté et déboute le Demandeur de son action avec dépens.

T. Julia, avocat du Demandeur.

Cartier & Cartier, avocats des Défendeurs.

P. R. L.

MONTREAL, 31 MARS 1863.

Coram SMITH, J.

No. 1863.

Demoiselle DeBeaujeu vs. Joseph Masse, fils.

PEREMPTION D'INSTANCE.

JURY.—1o. Qu'en supposant que la demanderesse soit morte civilement (ce qui n'est pas décidé par le jugement) avant que la péremption soit acquise, la mort civile n'ayant pas été notifiée au Défendeur, avant la motion de péremption, la péremption ne peut être écartée; 2o. la prétendue mort civile. 3o.—Que le certificat du Protonotaire ne peut être attaqué que par voie d'inscription de faux. 3o.—Que la péremption ne peut être couverte par un procédé entre la signification de la motion et sa présentation en cour.

Le Défendeur ayant fait signifier aux avocats de la Demanderesse une motion de péremption d'instance, la Demanderesse obtint la permission d'y répondre par écrit, et dans sa réponse, elle prétendit: 1o. que la Demanderesse, avant la péremption acquise, était morte civilement, ayant fait profession religieuse et professé les vœux solennels, dans le couvent des Dames de la Congrégation de Montréal; 2o. que le plaidoyer, mentionné comme le dernier procédé fait dans cette cause, au lieu d'avoir été produit le 17 mai 1859, ainsi que le disait le certificat du Protonotaire, n'avait été produit que dans le cours d'avril 1862, ainsi qu'il paraissait par les affidavits produits par la Demanderesse; 3o. qu'avant le jour où la motion de péremption avait été présentée en cour, la Demanderesse avait fait un procédé utile.

Laflamme R., pour la Demanderesse, prétendit que la Demanderesse ayant proféré des vœux qui l'excluaient du commerce du monde, elle était morte civilement, et que depuis lors, l'instance était interrompue, comme elle l'est habituellement par la mort naturelle; que par des affidavits produits, il était établi que le dernier procédé, mentionné dans le certificat du Protonotaire, n'avait pas eu lieu à la date qu'il portait; mais qu'il devait porter une date bien plus récente, et en deçà des trois dernières années; que la Demanderesse ayant fait un procédé utile, depuis la signification de la motion de péremption, mais avant sa présentation en cour, la péremption se trouvait couverte, ainsi qu'il avait été jugé dans une cause de Beaudry vs. Plinguet, 3 Jurist, p. 237.

Doutre J. répondit que le Canada étant soumis au droit public anglais, la mort civile, par profession religieuse, n'existait pas; que si la mort civile existait, l'autorité serait impuissante à soustraire les religieuses à la réclusion, si elles voulaient s'en affranchir; que si la mort civile existait, le mariage des religieuses et des prêtres serait nul aux yeux de la loi, et les enfants qui en naîtraient seraient adultérins; qu'enfin, les conséquences de ce principe bouleverseraient tout notre droit public; que quant à la date du dernier procédé, certifiée par le Protonotaire, elle ne pouvait être attaquée que par l'inscription de faux, et non par des affidavits, qui ne reposent sur rien de satisfaisant, quand on va au fond des choses, ainsi que le Défendeur l'a fait, non pour les besoins réels de sa cause, mais pour détruire le préjugé que les affidavits produits par la Demanderesse pouvaient créer; que si l'on pouvait ainsi attaquer le certificat du Protonotaire, il n'y aurait plus aucune foi à ajouter, pas même aux jugements enregistrés, sous la signature du Greffier; que quant au procédé utile prétendu fait,

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Gwill.

par la Demanderesse, depuis la signification de la motion de péremption, une seule et unique décision, dans le sens de cette prétention, pouvait être retrouvé dans l'histoire de notre jurisprudence. Depuis que cette décision avait été rendue tous les autres juges avaient eu l'occasion de juger la question dans un sens opposé, le seul qui soit conforme au droit du pays.

SMITH.—The first point in dispute was perfectly plain, namely, could a *religieuse* bring an action? This could not affect the present case and does not come up for the opinion of the Court; because no notice of this lady being a *religieuse* had been given, before the *péremption* demanded. Even the natural death of a party would hardly be sufficient under such circumstances. The second point was whether the paper in question had been fyled after the date it bears. A great many affidavits had been produced, but they were not satisfactory. If the Prothonotary had stated that it had been fyled of a wrong date, by mistake, the Court would have had no hesitation in ordering the date to be changed. Was then the Court to allow the signatures of its officers to be contradicted by affidavits, five or ten years after fyling papers? It was impossible; the *inscription de faux* is the only remedy open against the certificates of the Prothonotary.

As to the last ground, the fixed opinion of all the judges of this Court is decidedly against the decision cited by the Plaintiff, and no proceedings taken after the service of the demand of *péremption* can have the effect of interrupting or setting aside an acquired right.

Péremption granted and action dismissed with costs.

Lastamme & Lastamme, for Plaintiff.

Doutre & Daoust, for Defendant.

(J. D.)

MONTREAL, 24TH DECEMBER, 1862.

Coram SMITH, J.

No. 240.

Sweet-apple vs. Gwill.

Held:—That although there is no community of property, according to the Custom of Paris, between parties married in Upper Canada, their then domicile, without any ante-nuptial contract, yet, an action *en séparation de biens* will be maintained in favour of the wife, by reason of the insolvency of the husband, since their removal to Lower Canada.*

The Plaintiff, by her declaration, alleged that on the 8th March, 1855, at the city of Toronto, she was lawfully married to the Defendant.

That they then resided and thereafter continued to reside at or near Toronto, and the Defendant administered the estate of the Plaintiff. That they removed to Lower Canada in the month of July, 1859, and moved to Lachine where they continued to live and reside; and the Plaintiff, after alleging the insolvency of the Defendant, prayed for a *séparation de biens*, in the terms mentioned in the following judgment:

The Court having heard the Plaintiff by her Counsel, the Defendant having made default, examined the proceedings and proof of record and deliberated

thereon. It is considered and adjudged that the said Plaintiff shall and may, from the date of her *demande*, to-wit, from the sixth day of November, 1862, (date of service of process in this cause,) hold, possess, use, administer and enjoy separately and apart from the said Defendant, all and every her estates and property, real and personal, moveable and immoveable, as well those which belonged to her before her marriage with the said Defendant, as those which have accrued or shall hereafter accrue to her, and to which she is now and may hereafter become in any way entitled, without molestation, trouble or hindrance, by or on the part of the said Defendant or any person whomsoever; and the Court doth adjudge and condemn the said Defendant to guarantee, acquit and indemnify the said Plaintiff from and against all and every the debts, sum or sums of money for which he may have caused the said Plaintiff to be jointly with him liable or responsible, and to pay to the Plaintiff the costs of this action.

More vs. Ray.

J. A. Perkins, jr., Attorney for Plaintiff.

(P.R.L.)

SOREL, 19TH FEBRUARY, 1863.

Coram BADGLEY, J.

Ex parte MOGÉ.

Petitioner for a Writ of Certiorari.

vs.

ROY, *Prosecutor in the Court below.*

Held :—That upon a writ of Certiorari to remove the proceedings had and conviction made in pursuance of Chap. 6 Cons. S. L. C., such conviction being for "keeping a house of public entertainment," will be quashed, inasmuch as it is no offence unless qualified within the terms of the said Statute.

PER CURIAM :—The petitioner was prosecuted under the provisions of the Act respecting Tavern Keepers and the sale of intoxicating liquors, for "having kept a house of public entertainment." This allegation constitutes no offence and the proceedings had were not therefore in pursuance of the said act.

It is necessary to qualify the keeping of such a house of public entertainment, by alleging that it is for the reception of travellers and others. The simple allegation of keeping a house of public entertainment is not sufficient to bring this suit within the provisions of Chap. 6, Cons. S. L. C., as it may have been a Circus or a Theatre, which are also houses of public entertainment.

Conviction quashed.

Olivier & Armstrong, attorneys for Petitioner.

Piché, for Respondent.

(P. R. L.)

* *Vide* 3 L. C. Jurist, p. 64, *Rogers vs. Rogers*.

MONTREAL, 21st FEBRUARY, 1863.

Coram MONK, J.

No 1850.

Cassant vs. Perry.

- Held:—1st. That it is not competent for the payee of notes signed with the name of a copartnership firm, to bring an action against one of the partners alone, for the amount of said notes unless it is especially alleged in the Plaintiff's declaration that said copartnership had been dissolved previous to the institution of the action.
- 2o. That where notes are signed with the name of the copartnership firm and an action is brought against one of the partners individually, for the whole amount, the statement made in Plaintiff's declaration, "that at the periods when the notes were made, one of the partners who some weeks ago left Canada to go to the United States and the Defendant were in copartnership," is not a sufficient allegation of dissolution of the copartnership.
3. That the Plaintiff will be allowed to amend his declaration by stating that the copartnership had been dissolved previous to the institution of the action on payment of thirty shillings costs.

The declaration set forth, that at the different periods therein after mentioned, Wm. W. Morrow who had left Canada some weeks ago to go to the United States of America, and the defendant, were merchants in copartnership under the name of Morrow and Perry; that at Montreal on the 24th September, 1860, Morrow and Perry then in copartnership made their Promissory Note for \$98.50 signed with their copartnership name, payable four months after date, for value received to the order of Vital Cassant the Plaintiff. The Plaintiff also claimed for another note made and signed in a like manner, and concluded for judgment against the Defendant alone as liable for the whole amount of the said notes in all \$264.34 and interest.

This action was met by a *défense en droit*, which set forth that the Plaintiff's action was unfounded in law, among other reasons. 2o. Because it appears by the declaration of the Plaintiff that the present action is founded on two notes made and signed by the heretofore copartnership of Morrow and Perry, and by it due to the Plaintiff.

3o. Because it appears by the said action that the amount payable on said two notes is due conjointly and solidly by the said Wm. Morrow and George L. Perry, and not by the last alone in his own proper and private name and in the way set forth in the said action.

4th. Because it appears by the said action, that the said George L. Perry, was never at any time indebted towards the Plaintiff in any sum of money nor for any cause whatever. That in consequence the Plaintiff has no right of action against the Defendant personally and privately, but only conjointly and solidly with the said Wm Morrow.

At argument, Ricard, for Defendant, contended that the notes having been signed with the copartnership name of Morrow and Perry, and there being no allegation in Plaintiff's declaration of a dissolution of said copartnership, the obligation to pay under said notes was a joint and solid one. The Defendant could not be selected and sued alone in his individual name, but must be sued in conjunction with his partner whose name was on the notes with his own.

Mousseau, for Plaintiff, represented that the words in Plaintiff's declaration that at the periods when the notes were made, one of the partners who some

weeks ago left Canada to go to the United States and the Defendant *were* in copartnership "was a sufficient allegation of the dissolution of the said firm of Morrow and Perry. He also argued that the dissolution of the said copartnership was admitted by the Defendant in his *defense* where he referred to "two notes made and signed by the *heretofore* copartnership of Morrow and Perry."

Ex parte Roy.

Per curiam.—There is no allegation in Plaintiff's declaration which sufficiently shews that there is a dissolution of the firm of Morrow and Perry who signed the notes in question in this cause. Under these circumstances the *defense en droit* of the Defendant is well founded. But a motion to amend his declaration by inserting the words "that before the institution of this action and a long time before, the said partnership existing between the said Wm. W. Morrow and the Defendant in this action was dissolved" having been made to the Court, the Court will grant the amendment on payment by the Defendant to the Plaintiff of thirty shillings costs.

Mousseau and Labelle for Plaintiff.

L. Ricard, for Defendant.

(J. L. M.)

SOREL, 19TH FEBRUARY, 1863.

No. 2034.

Coram BADGLEY, J.

Ex parte Roy,

Petitioner for a writ of Certiorari.

Held—10. That the return of the notice of motion for a writ of *Certiorari* made by a bailiff is sufficient.

20. That such a return need not be proved upon oath.

In this case the Prosecutor in the Court below having appeared when the motion for a writ of *Certiorari* was made, objected to the granting of the motion upon the ground that the return of the notice of such motion was insufficient not being proved under oath, as required by the Imperial Statute 13, Geo. II, ch. 18, sec. 5, regulating proceedings upon *Certiorari*.

The Respondent contended: That it was the proper time to take advantage of this defect, as it would be too late afterwards.

Paley, on Convictions, edition of 1856, p. 360, 4th alinea, p. 364:—

That the Imperial Statute, which required that the six days' notice should be "duly proved upon oath," had not been repealed by the Provincial Act, ch. 80, sec. 2, sub-sec. 2, Cons. Stat. L. C., which latter Statute applies only to the returns of the different proceedings had after the granting of the writ of *Certiorari*. That this reasoning had been applied in several instances by the Superior Court in Montreal, in 1850 and 1851, in the following cases:

No. 96, *Ex parte Pierre Chicoine*, 7th October, 1850.

No. 153, *Ex parte Hiram Waite*, 3rd December, 1850.

No. 146, " " " 7th January, 1851.

Daoust
vs.
Aumais.

In those cases the proof of service of notice of motion having been made by the return of a bailiff, the Court decided that the English Statute and the rules which obtained in England, required proof of service by affidavit.

Per Curiam.—The practice now followed in the District of Montreal is different and requires no proof of service by affidavit.

Motion granted.

Olivier & Armstrong, attorneys for Petitioner.

Germain, attorney for Respondent.

Lafrenaye, Counsel.

(P.R.L.)

MONTREAL, 11 OCTOBRE, 1861.

Coram MONK, A. J.

No. 4.

DAOUST,

Appelant.

AUMAIS.

Intimé.

Juge :—Que la Cour de Circuit siégeant en appel, sous l'acte des municipalités de 1860, a le pouvoir de casser un règlement d'une municipalité, et un jugement d'un tribunal inférieur quand bien même la nullité de ce règlement n'y aurait pas été invoquée.

20. Qu'un règlement fixant le poids du pain et établissant une amende pécuniaire est nul.

30. Que la partie qui a secondé l'adoption de ce règlement peut en invoquer la nullité.

Le 9 Avril, 1861, l'Appelant fut convaincu, à la poursuite de l'intimé, inspecteur des poids et mesures, par la Cour des magistrats du village de la Pointe-Claire, d'avoir vendu dans la municipalité de ce village du pain ne pesant pas le poids de six livres, en contravention au règlement de la municipalité de ce village, en date du 20 août, 1855, et condamné à payer une amende de dix chelins à la Corporation du village et les dépens.

Le règlement en question avait été adopté à l'unanimité à une assemblée régulière des conseillers, et porte ce qui suit :—Proposé par M. Brisbois, secondé par B. Daoust, (L'appelant).

" Que la pesanteur du pain soit fixée à 6 livres, et que les initiales du boulanger soient marquées sur le dit pain et que pas moins de 10s. ni au-dessus de 20s. soient payés par ceux qui manqueront à ces règlements.

L'Appelant en Cour inférieure n'invoqua pas la nullité du règlement, mais, s'attacha uniquement à faire une preuve contradictoire.

L'Appelant interjeta appel du jugement de la cour des magistrats suivant les dispositions de l'acte des municipalités, invoquant entre autres griefs d'appel, la nullité du règlement qui formait la base de la poursuite dirigée contre lui.

A l'argument, *Mr. Girouard* pour l'Appelant, prétendit que l'acte des municipalités, section 27, p. 9, donnait aux conseils locaux le pouvoir de fixer le poids du pain dans les limites de la municipalité, de forcer les boulangers à mettre leurs initiales sur le pain, et de confisquer le pain ne pesant pas le poids établi ou de mauvaise qualité, mais que c'était là les seuls pouvoirs qu'il leur donne ;

que le statut avait établi une peine contre les contrevenants, savoir : la confiscation du pain, et que les conseils n'ont pas en conséquence le droit d'ajouter une nouvelle peine en établissant une amende pécuniaire, qui n'aurait pu être imposée que dans le cas où le statut n'aurait porté aucune pénalité, et qu'en conséquence, le règlement, en date au 20 août, 1855, du conseil du village de la Pointe-Claire était contraire à la loi et nul.

Mr. O. Loranger pour l'intimé, soutenait que le tribunal en appel n'avait pas juridiction sur une question de validité d'un règlement qui n'avait pas été portée en appel au conseil de comté, comme le veut la loi, et qui n'avait pas même été soulevée en Cour Supérieure ; que d'ailleurs le règlement en question était légal ; le statut ayant été silencieux sur l'amende pécuniaire, et tout conseil municipal ayant sous la section 24. par 23, le droit de passer tout règlement non contraire à la loi pour le bien général des habitants de la municipalité, le conseil municipal de la paroisse de la Pointe-Claire avait le droit de passer le règlement en question ; que d'ailleurs le paragraphe 22 de la même section 24e, semblait décider formellement la question en sa faveur ; qu'en effet, sous cette clause de la loi, tout conseil municipal avait le droit d'imposer toute amende raisonnable, n'excédant pas vingt piastres et même l'emprisonnement en contravention de tout règlement du conseil ; qu'en conséquence, le conseil de la Pointe-Claire, en imposant l'amende en question contre ceux qui violaient son règlement avait agi suivant la loi ; qu'enfin il serait bien extraordinaire de permettre à l'Appelant de demander la nullité d'un règlement qui était son ouvrage.

En réplique, Mr. Girouard dit que ces derniers pouvoirs donnés aux municipalités ne pouvaient pas être exercés, lorsque le statut établissait lui-même une amende contre les coupables, comme dans l'espèce actuelle, parce qu'alors l'attention stricte de la loi est que la punition n'aille pas au-delà de cette pénalité ; qu'enfin cette nullité apparaissant sur la face même du règlement, il était permis à toute personne de l'invoquer dans tout état de cause.

MONSIEUR J. La conviction prononcée par le tribunal inférieur doit être annulée, parce qu'elle repose sur un règlement municipal, nul de plein droit. Il est évident que le statut ayant imposé une peine contre les boulangers qui vendaient du pain n'ayant pas le poids prescrit par les autorités municipales, ces derniers n'avaient pas le droit d'en imposer ou d'en substituer une nouvelle. En fait de pénalité, les lois doivent toujours recevoir une interprétation stricte et étroite ; et d'après ce principe, la Cour est d'opinion que le règlement du 20 août 1855, aurait dû non pas imposer une amende pécuniaire, mais ordonner simplement la confiscation du pain, et que, pour cette raison, il est entaché d'une nullité radicale, dont la cour doit donner le bénéfice à quiconque l'invoque. L'appel est maintenu avec dépens.

M.M. Carter et Girouard, pour l'Appelant.

M.M. Loranger et Frères, pour l'Intimé.

(D. G.)

MONTREAL, 31 MARCH, 1863.

Coram, MONK, A. J.

No. 9.

Ex parte, Cousine

(for a writ of Certiorari.)

AND

Raphaël Bellemare.

(Prosecutor in the Court below.)

Held:—That in a prosecution for selling liquors without a license, the information need not be under oath.

In this case the information and conviction were for the offence of selling liquor without a license. On the 27th March 1863, the Petitioner moved the Superior Court for a writ of Certiorari to issue upon several grounds contained in his affidavit of circumstances amongst others the following: Because no information under oath was ever exhibited to Charles J. Coursol, Esquire, judge of the Sessions of the Peace for the City of Montreal, previous to the issuing of the writ of Summons in the said prosecution; because in lieu of being under oath, the said information was merely signed by the said Raphaël Bellemare and not sworn to (*).

Per Curiam.—The provisions of the act respecting Tavern-keepers do not require that such an information be made or laid on oath, but on the contrary that act gives all the forms which are to be followed in such prosecutions; so that the Section 24 of Ch. 103 of the Consolidated Statutes of Canada do not apply to such cases.

Kerr and Nagle, Attorneys for Petitioner.

Application refused.

Lafrenaye, Attorney for Bellemare.

(P. R. L.)

CIRCUIT COURT.

MONTREAL, 21st FEBRUARY, 1863.

Coram MONK, J.

No. 3084.

Lafond et al. vs. Chagnon and La Chambre d'Agriculture, Tiers Saisie,

AND

Hood, Curator mis en cause.

Held, That a person cannot be held to appear in a cause and take up the instance in place of the Defendant deceased by a rule nisi but by reason of an ordinary writ of summons and petition in due form.

The Defendant having died, and Thomas D. Hood having been appointed Curator to his vacant estate and succession, the Plaintiff took out a rule nisi to compel the Curator to take up the instance as the representative of the Defendant.

PER CURIAM.—The proper course was for the Plaintiff to take out a writ of summons and petition annexed in the usual form, setting up the facts and the order required. The rule must therefore be discharged.

Médéric Lanctot for Plaintiff.

Rule discharged.

(P. W. T.)

(*) Vide Chap. 6, C. S., of Lower Canada, Sec. 43.

COURT OF QUEEN'S BENCH.

IN APPEAL.

MONTREAL, 12TH MARCH, 1857.

Coram LAFONTAINE, C. J., AYLWIN, J., DUVAL, J. CARON, J.

JEAN BAPTISTE LEBLANC,

Plaintiff in the Court below.

APPELLANT.

AND

FRANCOIS PELLERIN,

Defendant in the Court below.

RESPONDENT.

HOLD.—That in default of a vendor making cession of Letters Patent to a purchaser in the terms of an agreement between them to the effect that the purchaser should obtain such Letters Patent in the name of the vendor, the Court will give a judgment to have the effect of such cession as if a sufficient deed had been passed to that effect, and the judgment will have the force and effect which such a deed would have had and will invest the purchaser with all the rights, title, interest and property which he could have acquired by such deed.

This was an appeal from the court of Queen's Bench; *Rolland, C. J., Day, J. Smith, J.*, (25th July, 1848), where the Plaintiff's action was dismissed with costs. This judgment was reversed in appeal.

It appears that in 1841, the Plaintiff Leblanc bought from the Defendant all the augmentations and betterments which he had made upon a lot of crown land situate in the first range of augmentations of Kildare.

This sale was made, according to the terms of the deed, pour et moyennant le prix et somme de cent soixante et quinze livres, douze sous, ancien cours, dres au dit Demandeur par le dit Défendeur, en vertu de deux billets dont le dit Demandeur a déclaré en avoir reçu le paiement par le moyen de la dite vente avec la condition que le dit Demandeur obtiendrait les titres du lopin.

But in case the Plaintiff did not succeed in obtaining letters patent, the Defendant was to defray all expenses incurred by the Plaintiff thereabout and also to pay the said two notes as if the said sale had never taken place.

On or about the 8th July, 1843, the Plaintiff in the name of the Defendant obtained letters patent of the said lot from the government and paid in consideration therefor to the crown agent the sum of twenty pounds.

After the Plaintiff, had thus obtained the letters patent, he demanded from the Defendant a cession and transfer of all his rights and claims to the said letters patent and a declaration that they had been paid for and obtained by the Plaintiff in execution of the covenant created by the deed of sale before referred to. This the defendant refused to do, and the Plaintiff consequently brought this action and in the conclusion of his declaration prayed the Court in the following terms: Que le Défendeur soit condamné à lui faire délaissement et abandon des dites améliorations et du terrain susdit, et de faire cession et abandon par acte suffisant, que le Demandeur paiera, de ses droits, intérêts et prétentions dans les lettres patentes émanées comme dit est, en son nom, le 8 Juillet mil huit cent quarante trois, du terrain suivant, désigné en langue anglaise, "the

Leblanc,
and
Pellerin.

northeast half of lot number twelve in the first range of the said augmentation of the township of Kildare, containing about one hundred acres more or less" avec déclaration que les dites lettres patentes ont été ainsi émanées et octroyées par l'entremise du Demandeur, et à raison du paiement par lui fait à la couronne, de la somme de vingt livres courant, à moins que le Défendeur ne paie au Demandeur sous le délai de trois jours après la signification du jugement, la dite somme de deux cent cinquante livres courant, pour l'indemniser de ses dommages, dépenses et deniers payés par lui, et à défaut par le Défendeur de payer dans le délai, la dite somme de deux cent cinquante livres courant, au Demandeur, que le jugement susdit tiendra lieu au Demandeur de cette cession des dites lettres patentes et de cette déclaration, comme si acte suffisant eut été dûment consenti à cet effet, et que le dit jugement aura la force et effet que tel acte aurait eu, s'il eut été fait, et qu'à l'avenir, le Demandeur sera investi de tous les droits, titres, intérêt et propriété qu'il aurait pu acquérir par tel acte, le tout avec dépens."

The Defendant by his *exception péremptoire*, contended that he had not sold to the Plaintiff, the fonds et propriété foncière of the said lot and to support this plea cited the deed of sale as follows: Pour sûreté et garantie des choses ci dessus vendues, les dits vendeurs, (les Défendeurs), ont hypothéqué tous leurs biens présents et futurs, et par privilège spécial la terre ci-dessus qui y reste affectée. The Defendant argued that he could not have mortgaged the said lot unless he retained the absolute property and ownership of it.

The Court of Appeal rendered the following judgment reversing the judgment of the Court of Queen's Bench, and maintaining the conclusions of the Plaintiff.

La Cour considérant que, par l'acte du dix Mars, mil huit cent quarante-un, énoncé dans la déclaration en cette cause, le dit François Pellerin a vendu et cédé au dit Jean Baptiste Leblanc, tous les droits qu'il pouvait avoir dans le lot de terre dont il s'agit en cette cause; qu'il a été même stipulé que le dit Leblanc aurait le droit "d'en prendre possession immédiatement," c'est-à-dire, sans attendre que les lettres patentes qu'il fallait obtenir du gouvernement, fussent émanées; que, quelque défectueuse que soit la rédaction du susdit acte, l'interprétation ci-dessus est la seule qui puisse lui donner effet: suivant l'intention des parties: que le dit Pellerin est tenu à son exécution, en autant que cette exécution peut dépendre de lui, et que, par conséquent, ses exceptions et défenses sont mal fondées:

2o. Considérant que quoique l'Appelant Leblanc n'ait pu obtenir les lettres patentes du gouvernement, que pour la moitié du susdit lot de terre, il n'en a pas moins le droit de demander à l'intimé l'exécution du susdit acte de vente quant à cette moitié, que les dites lettres patentes ayant été émanées au nom de l'intimé comme premier occupant, l'Appelant est bien fondé dans la demande qu'il fait à l'intimé de lui passer un acte de cession des droits qui ont été acquis à la propriété du dit terrain, en vertu des dites lettres patentes, et ce pour compléter le titre d'acquisition que l'intimé est obligé de lui donner. 3o. Considérant par conséquent, que dans le jugement dont est appel, et qui déboute le dit Jean Baptiste Leblanc de sa demande, il y a mal jugé: Infirme le susdit jugement rendu le vingt-huit

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Garceau.

Février, mil huit cent cinquante-cinq, par la Cour Supérieure siégeant à Montréal, et cette Cour procédant à rendre le jugement que la dite Cour de première instance aurait dû rendre, condamne le dit François Pellerin à délaisser et abandonner au Jean Baptiste Leblanc sous quinze jours de la signification du présent jugement, le terrain décrit comme suit aux susdites lettres patentes, savoir : "the north east half of lot, number twelve in the first range of the said augmentation, of the township of Kildare, containing about one hundred acres "more or less," avec les améliorations sur icelui, et de faire cession et abandon, par acte suffisant que le dit Jean Baptiste paiera, de tous les droits, intérêts et prétensions que le dit François Pellerin a, dans les lettres patentes susdites émanées en son nom le 8 Juillet, mil huit cent quarante trois, sur le susdit terrain, avec déclaration que les dites lettres patentes ont été ainsi émanées et octroyées par l'entremise du dit Jean Baptiste Leblanc, et à raison du paiement par lui fait à la couronne, de la somme de vingt livres ; et à défaut par le dit François Pellerin de ce faire ; le présent jugement, tiendra lieu au dit Jean Baptiste Leblanc de telle cession des dites lettres patentes, et de telle déclaration susdites, comme si acte suffisant eût été consenti à cet effet, et que le dit jugement aura la force et effet que tel acte aurait eu, s'il eût été fait, et le dit Jean Baptiste Leblanc sera investi de tous les droits, titres, intérêts et propriété qu'il aurait pu acquérir par tel acte. Et la Cour condamne le dit François Pellerin à payer au dit Jean Baptiste Leblanc, les frais encourus par ce dernier, tant en Cour de première instance que sur le présent appel. Et enfin il est ordonné que le dossier soit remis à la dite Cour Supérieure siégeant à Montréal.*

W. R. R.

EN APPEL:

MONTREAL, 1^{er} DECEMBRE 1862.

Coram AYLWIN, J., DUVAL, J., MEREDITH, J., MONDELET, J., BERTHELOT, J., AS
JEAN BAPTISTE LAMOTHE, *Appelant*.

et

CHARLES GARCEAU, *alias GARSEAU, Intimé*.

Jugé:—1^o. Que la formalité de l'enregistrement des oppositions dans la Cour de Circuit appellable n'est pas nécessaire.

2nd. Que ce n'est pas par une exception à la forme, mais par une motion, que l'on peut attaquer les procédures intrinsèques nécessaires pour mettre une opposition régulièrement devant la Cour.

3^o. Qu'un retour d'huiusier peut être daté en chiffres.

4^o. Qu'on a toute la journée du rapport pour produire une opposition.

BERTHELOT, J., en rendant le jugement pour la Cour, s'exprime dans les termes suivants :

"L'Appelant s'est porté Opposant, par Opposition afin de distraire à la saisie et vente de certains effets mobiliers saisis sur Joseph Péloquin, à la poursuite de l'Intimé, Demandeur contre ce dernier, sur jugement rendu par la Cour de Circuit du District de Richelieu, dans une cause appellable.

L'Opposition, datée du 24 Avril 1862, fut accordée le même jour par l'Hon. Juge Bruneau, avec ordre de la rapporter devant la Cour jeudi le premier de Mai alors prochain.

*Pothier: Vente: Nos. 69, 279, 479. Toull: Vente Nos. 114 and seq: Gaulin et ux. v. Pichette et ux. et al. 3 Rev. de Leg: L. C. pp. 261, 188.

Lamothe
et
Garceau.

Le certificat du Greffier fait voir qu'elle a été enregistrée le même jour, et qu'elle a été rapportée le 1er. mai.

Le 8 mai, l'Intimé fait motion pour rejeter cette Opposition, pour les trois raisons suivantes :

“ 1^o. Parce que la dite Opposition n'a jamais été dûment enregistrée au Greffe, ni dans les Régistres de cette Cour, et qu'il n'existe sur la dite Opposition, tant sur l'original que sur la prétendue copie d'icelle annexée au Rapport de l'Huissier saisissant Charles Turcot, aucun certificat constatant tel enrégistrement, et que, dans le cas même où un tel Certificat existerait sur l'original de la dite Opposition, il n'existe pas sur la dite copie d'icelle ; que jamais copie du dit certificat n'a été signifiée au dit Huissier saisissant, et qu'il y aurait variante essentielle entre la dite copie et le dit original ;

2^o. Parce que la dite Opposition n'a été rapportée et filée au Greffe de cette Cour qu'entre les deux et quatre heures de l'après-midi du jour fixé pour son Rapport, savoir, du 1er. jour du mois de mai courant, et que par conséquent elle n'a pas été rapportée ni filée dans le temps prescrit par la loi et les règles de pratique :

3^o. Parce qu'aucun retour ou rapport d'Huissier, en forme authentique ne constate la signification qui aurait dû être faite à une date certaine et précise de la dite Opposition au dit Huissier saisissant.”

L'Intimé a prétendu que c'était par une exception à la forme que l'Appelant aurait dû faire valoir ces moyens. Mais ce n'est pas le cas, parceque ce sont des moyens qui n'attaquent pas la forme ou le libellé de l'Opposition, mais bien seulement les procédures intrinsèques qu'il fallait suivre pour la mettre régulièrement devant la Cour.

Quand au mérite des moyens en eux-mêmes—je ne les crois pas fondés. Le premier parcequ'il n'y a aucune règle de pratique écrite ou par usage qui exige l'enrégistrement des oppositions de cette espèce dans les causes appelables.

Il y avait bien autrefois une pareille règle de pratique, introduite par l'usage et non écrite, mais elle n'affectait que les oppositions dans les causes du Terme Inférieur et non appelables et au-dessous de £11. 2s 2d. C'était une règle de pratique d'un caractère buréal pour assurer le paiement des émoluments du Prototaire ou Greffier.

Le second moyen me paraît sans aucun fondement : certainement que l'Opposant avait toute la journée du 1er. mai, pour rapporter son Opposition. Il n'y a aucune règle de pratique, qui l'obligeait de la rapporter à 10 heures du matin, plutôt qu'à 3 heures de l'après-midi, pourvu que ce fut entre les heures d'office, suivant la règle de Pratique, No. 4. Et d'ailleurs le Fiat du Juge ne l'obligeait à rien de plus, sans mention d'aucune heure en particulier. Hors tous les jours du terme de la Cour de Circuit, et tant que la Cour n'est pas ajournée, l'on reçoit des retours, et il ne paraît pas, par le certificat du Greffier, que l'Opposition a été rapportée au Greffe, après l'ajournement de la Cour, le 1er. mai.

Quand au 3^{me}. moyen, il me paraît que le retour de l'Huissier, qui a signifié copie de cette Opposition, à l'Huissier saisissant Charles Turcotte, est suffisant ; la règle de Pratique No. 26, n'exige pas que la date du retour soit en lettres. Elle porte : “That every certificate of service, shall particularly describe the

manner, place, and time of service in letters." Cela étant : Il s'en suit que le corps du retour est bon, puis-qu'il y dit qu'il a fait la signification" le *vingt-cinquième jour d'avril courant, entre huit et neuf heures de l'avant-midi.*"

Cette expression *courant* est suffisante vu la date du retour en chiffres, puis-que celle-ci suffit pour lui donner toute la qualification nécessaire, d'après le sens de la signification que l'on attache au mot *courant* dans le langage grammatical et ordinaire.

J'ajouterai que nous avons dans le record la preuve *matérielle* que la signification a été faite le 24 avril, 1862.

L'opposition a été accordée et signée par le Juge Bruneau, le 24 Avril. Son Greffier certifie que l'Opposition a été rapportée le 1er. mai. Or, comme il n'y a qu'un seul mois d'Avril, dans l'année, et que le retour mentionne que c'est le 24 Avril courant, qu'il a signifié, il s'ensuit que nous avons la preuve que la signification a eu lieu, en Avril 1862."

Girouard, pour l'Appelant.

Piché, pour l'Intimé.
(D.G.)

McBean
vs.
Cullin.

SUPERIOR COURT.

MONTREAL, 13TH MAY, 1851.

Coram DAY, J., MONDELET, J.

No. 306.

McBean vs. Cullin.

Held:—That *péremption* will be granted in a case not contested and where the Defendant only appeared, if the Plaintiff allows the proceedings to lay over for three years.

On the return of this case, the Defendant appeared by Counsel on the 29th July, 1846. No proceedings were had for more than three years since that appearance. On the 5th May, 1851 the Defendant moved the Court for *péremption d'instance*.

Per Curiam:—The Defendant has not pleaded, but the Plaintiff has taken no proceeding during a period of three years, and now the Defendant moves for *péremption* upon this ground. It is competent for him to do so, though he has not pleaded; he can come by motion, because he is not bound to plead to a bad action.

The Court, having heard the parties by their Counsel upon the motion of the Defendant of the 5th of May instant, having examined the proceedings and deliberated, considering the cessation of proceedings upon the action brought by the Plaintiff against the Defendant since the 29th day of July, 1846, date of the last proceedings in this cause, the said action in recovery of the sum of £250 currency as the value of certain quantities of pine timber, the property as alleged of him the said Plaintiff: Doth grant the said motion and adjudge and declare the instance in this cause *périmée* and in consequence doth dismiss the action with costs against the Plaintiff as well of the said instance and of the said motion *en péremption d'instance*.

Day, Attorney for Plaintiff.

A. & G. Robertson, Attorneys for Defendant.

(P. R. L.)

SUPERIOR COURT.

MONTREAL, 15TH DECEMBER, 1862.

Coram SMITH, J. VANFELSON, J. MONDELET, J.

No. 1236.

Trudeau vs. De Lanaudière, et al.

Held: 1.—That in an action for the recovery of fees by a notary for the passing of Deeds, the notarial copies of such deeds will be sufficient evidence.

2. That the costs of an inventory and copy thereof must be borne by the surviving conjoint for one half and by the representatives of the deceased conjoint for the other half.

The Defendants were sued for the sum of £130 being the amount of fees due to the Plaintiff as *cessionaire* of M^{re} Jobin notary public, for the making of the inventory of the Community of property heretofore existing between the late Hon. B. Joliette and his widow one of the Defendants; the other Defendant being his heir at law.

Mondelet, J.—The only evidence of debt is the Inventory itself; although a notarial instrument is to be regarded as an *acte authentique* making proof for or against the parties, I do not think that it can make proof for the notary himself.

Smith, J.—This deed must be considered authentic for this as well as for other purposes. It sets forth that it was made at the request of Mrs. Joliette and was signed by herself. There cannot be better proof than her own name.

It has been contended that she having renounced the *Communauté* and this being an inventory of the goods of the community, she is not liable for the costs of such a deed, but it was made in order that she might judge whether it would be better for her to renounce or accept the community.

The only question which remains to be decided is whether the judgment should be given against her and the representatives of the other share of the community jointly and severally or against them each for one half. The Court is of opinion that they are liable each for one half.

The judgment is as follows:—

La Cour. condamne les Défendeurs ès noms et qualités conjointement à payer au Demandeur la somme de £130 comme suit, savoir : la Défenderesse la somme de £65 moitié de celle de £130, et le dit Défendeur l'autre moitié de la dite somme, dette due par les Défendeurs ès noms et qualités pour différents ouvrages et vacations professionnels faits et fournis par le dit M^{re} Jobin Notaire pour la Défenderesse et la succession du dit feu l'Honorable B. Joliette ; les dits ouvrages consistant dans le Procès-verbal de l'inventaire des biens de la communauté qui a existé entre la dite Défenderesse et le dit feu B. Joliette avec vacation pour l'estimation du mobilier de la communauté et autres procédés relatifs au dit Inventaire avec aussi la copie du dit Inventaire.

Mr. le Juge Mondelet ne concourt pas dans ce jugement.

Pelletier & Papin, Avocats du Demandeur.

Drummond, Loranger & Dunlop, Avocats des Défendeurs.

(P.R.L.)

MONTREAL, 31st MARCH 1862.

Coram SMITH, J.

No. 1163.

*Jasmin vs. Lafantaisie.*Dumont
vs.
Gourt.

Held.—That a captain has no lien for wages on the vessel of which he is captain.

In this cause a *saisi-arrêt simple avant jugement* issued on the affidavit of the Plaintiff to attach a certain barge then in the Lachine Canal called the Rosa, The affidavit set forth that the Defendant who was proprietor of the barge Rosa, of which the Plaintiff was captain, was indebted to him in the sum of \$692.05 for wages as such Captain.

That the Defendant had left the limits of this Province and without the benefit of a writ of *saisi-arrêt* before judgment to seize the said barge Rosa, he would lose his debt and sustain damage.

The declaration also alleged that the Plaintiff as Captain had a special privilege and *lien* on the said barge Rosa for the payment of his wages, and concluded that the Court should declare so, and that the said barge Rosa might be sold to pay the Plaintiff's debt by special privilege.

Per Curiam—In this case the Plaintiff prayed that the Defendant be condemned to pay him the sum of \$692.05, and that the barge in question be declared specially hypothecated for the said debt. These conclusions cannot be granted. The Court is not aware of any law by which a captain has a *lien* on a vessel. It is true that in one or two cases the Court has declared that a *lien* existed; but these were very exceptional cases, and the rule was against them. Judgment would go simply for the amount claimed, with interest, without any hypothecation being conferred.

J. Duhamel, for Plaintiff.

Judgment for Plaintiff.

(J.L.M.)

MONTREAL, 31st MARCH, 1862.

Coram SMITH, J.

No. 1862.

Dumont vs. Gourt.

Held 1st.—That the alienation of real estate alone, is not a sufficient cause for an action of *capias ad respondendum*.

2. When a debtor alienates his estate, and declares that he received for it a less sum than he actually received, there is an intention on his part to deceive his creditors if he has no other property to meet his liabilities, and, an affidavit containing such allegations will be sufficient to maintain a *capias ad respondendum* against him.

The affidavit in this cause contained the usual allegations of indebtedness, and the belief of the deponent that the defendant had secreted his effects for the purpose of defrauding his creditors and as grounds for his said belief the deponent urged "that by deed of sale dated the 12th March, 1863, the Defendant sold to "one Michel Laforce a lot of land in the City of Montreal, for the sum of \$1470, "of which sum the Defendant in the said deed of sale admitted to have received " \$198. That it was untrue that the Defendant had only received on the price

Dumont
vs.
Gourt.

" of said land the sum of \$198.00, but on the contrary he had received the sum of \$466, and that it was by collusion with the said Michel Laforce that the Defendant acknowledged to have only received the sum of \$198.00, and by fraud and for the purpose of defrauding his creditors generally and the Plaintiff in particular. That the defendant has no other property but the land so sold. And that having been for a long time insolvent and incapable of paying his debts he had sold the said land for the sole purpose of defrauding his creditors; and that without the benefit of a *capias ad respondendum* against the body of the said Defendant he would lose his said debt and sustain damage."

On the 21st March, 1863 the Defendant made a motion to quash and set aside the writ of *capias ad respondendum* on the following among other grounds "Because in law the facts set forth in the said affidavit do not constitute a ground of fraud sufficient to justify the emanation of a writ of *Capias*." The other reasons in the motion were of a similar nature.

Per Curiam—This was a motion to quash a *capias*. The debtor did not complain of the causes of action, but alleged that in the motion to quash there were no sufficient grounds for the Plaintiff's belief that the Defendant was about to secrete his effects, &c. It was alleged in the affidavit, after the grounds of action had been set up, that the Plaintiff was credibly informed that the Defendant was on the point of concealing, and in fact had commenced to conceal his effects. The affidavit went on to state that the Defendant in March sold certain real property, and that he received \$466, but pretended that he had only received \$198. Defendant contended that the alienation of real estate alone was not a ground for taking out a *Capias*. This was true. It was not stated that the deed of sale was simulated or for the purpose of fraud. The deed of sale stood unassailed. But the Plaintiff went further, and affirmed that the Defendant had made a false declaration, with fraudulent intent, pretending that he had only received \$198, whereas he had received \$466. Now as it was alleged in the affidavit that the man had no other property in the world to meet his liabilities, the Court believed that there was sufficient evidence of an intention to deceive, and it could be no other than his creditors that he desired to deceive. All deception of this kind implied fraud. The motion to quash would therefore be rejected, but without costs.

Motion rejected.

Mousseau & Labelle, for Plaintiff.

Leblanc & Cassidy, for Defendant.
(J.L.M.)

DISTRICT OF ST. FRANCIS.
SHERBROOKE, 13TH MARCH, 1863.

Coram SHORT, J.
No. 324.

Vannevar et al. vs. DeCourtney.

Held,—That where judgment has been rendered in a cause instituted by a *Capias ad Respondendum*, petition on behalf of the parties who became bail to the Sheriff, to be allowed to put in special bail cannot be granted.

In this cause the action was commenced at Sherbrooke, and the defendant was arrested at Quebec. James A. Sewell and Thomas Anderson became bail in the usual manner for his appearance to answer the suit. The action was

instituted 31st August, 1861. The defendant appeared and contested the action upon the merits and final judgment was rendered against the Defendant on the 17th June, 1862. During the pending of the suit, application was made to the resident judge at Sherbrooke in vacation on behalf of the Defendant to be allowed to put in special bail at Quebec. The Honorable Judge expressed the opinion that he had no power to grant the petition. The petition was not persisted in, and was not filed of record in the cause. On the 13th of March, 1863, nine months after the rendering of the judgment and after an action had been instituted against the bail, a petition was presented to the Superior Court at Sherbrooke on behalf of the bail to be allowed to put in special bail. This petition was sustained by affidavits; one by Defendant stating that he was unable to put in special bail in the District of Saint Francis and that he had applied to be permitted to do so at Quebec, and that he had only lately ascertained that his petition had not been granted and one by the before named James Sewell to the effect that he would have put in special bail before had he not supposed that it had long since been done.

Wannover
vs.
DeCourtney.

SHORT, J.—There is no doubt but that the law should always be construed in favor of the liberty of the subject; however, in the present instance there is no room left for construction. The law is plain and positive. Under the law as it existed prior to the passing of the Act 12th Victoria, C. 42, special bail could be put in at any time even after judgment. By the 21st section of that Act, it is enacted that "Nothing in this Act shall prevent any person arrested under any writ of *Capias ad Respondendum* from putting in special bail to the action, as permitted by the law of Lower Canada, excepting only that such special bail shall not be received unless put in on the return day, or at any time before the return day, or within eight days next after the return day." This is very explicit as to the time when such special bail shall be put in. It is urged that the next clause of the same section provides "that the Court may, upon special application and sufficient cause shown extend the time for putting in such special bail." This appears, to contemplate an application, for causes to be assigned, for extension of the time beyond eight days after return, which application, should be made before the expiration of such delay. The present is not such an application; and, if it were, there are no causes assigned except what in law amount to simple neglect of the parties in default. The case of *Campbell vs. Atkins* has been cited. Inasmuch as the Court of Appeals were divided upon that case, it cannot be regarded as authority binding upon this Court. This question has been then elaborately discussed. The Honorable Chief Justice Lafontaine has reasoned with much force that the Act 12th Vic., C. 42 having for its express object the abolishment of imprisonment for debt and only permitting the arrest of the debtor to secure an assignment of his assets for the benefit of his creditors and imprisonment only as a punishment for fraud, and such imprisonment limited to one year, is inconsistent with the existence of a right to put in special bail and that it must necessarily be considered as abrogating such right. Without however entering upon that point the Court is clearly of the opinion expressed by the Honorable Chief Justice in that case, that after judgment has been rendered a forfeiture has been obtained

Ex parte
Charbonneau.

in favor of the Plaintiff, and that a petition of this nature cannot be granted. I regard the law as having precluded the Court from exercising any discretion whatever upon this point. The delay has been peremptorily fixed by the statute and the Court has only power upon sufficient cause shewn to extend that delay. This cannot surely be understood as giving the Court such power after the instance has terminated by final judgment in the cause. This petition must be rejected.*

Petition rejected.

Langlois and Pover, for petitioners.

Sanborn and Brooks, for plaintiff.

J. S. S.

MONTREAL 30 AVRIL 1863.

Coram BADOLEY, J.

No. 155.

EX PARTE

GEORGE CHARBONNEAU.

Requérant pour writ de certiorari.

Jugé:—1o. Que l'état d'héritier n'est pas l'état proprement dit d'une personne.

2o. Que la juridiction des Cours des Commissaires pour la décision sommaire des petites causes s'étend aux actions des créanciers d'un défunt contre son héritier.

Au terme d'avril, MM. Morin et Marchand pour le requérant faisaient application à la Cour Supérieure pour un *writ de certiorari*, se plaignant de l'illégalité d'un jugement de la Cour des Commissaires de la paroisse de Ste. Rose, parce qu'il y avait été poursuivi et condamné en qualité d'héritier, et que suivant la sec. 8e du Chap. 94, des Statuts Refondus du Bas-Canada, la juridiction des Cours des Commissaires ne s'étend pas à l'état civil des personnes en général, c'est-à-dire, à l'état d'héritier qui tient à l'état civil, et qu'ainsi la dite Cour Inférieure manquait de juridiction.

En réponse, Mr. Girouard pour les Commissaires, soutenait que l'action contre un héritier étant une action purement personnelle, et la sec. 7e du même Chap. 94 des Statuts Refondus du Bas-Canada donnant aux Cours des Commissaires juridiction sur toutes affaires purement personnelles et mobilières, la loi donnait pouvoir à la dite Cour des Commissaires de la Paroisse de Ste. Rose d'entendre, juger et décider la poursuite intentée contre le requérant en sa qualité d'héritier; que d'ailleurs la qualité d'héritier n'était pas l'état civil de la partie, mais n'était seulement qu'un droit découlant, comme tous les autres droits civils, de l'état civil du requérant.

PAR CURIAM.—Le requérant est poursuivi devant la Cour des Commissaires de la Paroisse de Ste. Rose en sa qualité d'héritier de sa mère; il se plaint du défaut de juridiction de la dite Cour; et après avoir examiné soigneusement le statut qui a rapport aux Cours des Commissaires, je ne vois rien qui puisse empêcher celle de Ste. Rose d'entendre, juger et décider une affaire pour laquelle

* The same decision was given in two other causes in the same Court, No. 309 and No. 321, Read vs. DeCourtney, and Pope vs. DeCourtney.

il est poursuivi en qualité d'héritier, c'est-à-dire en d'autres termes, suivant les dispositions de notre droit des successions, une affaire purement personnelle, sur laquelle toute Cour des Commissaires a juridiction. D'ailleurs, la qualité d'héritier n'est pas l'état civil de la partie. Son droit de citoyen du Bas-Canada n'est pas en effet mis en litige.

Delude
vs.
McGill

Writ refusé.

M. M. Morin et Marchand, Avocats du Requérent.

D. Girouard, Avocat des Commissaires.

(D. G.)

MONTREAL 21st MARCH, 1863.

Coram MONK, J.

No. 1418.

Huot dit Delude vs. McGill et al.

Held:—That when the Attorneys in a record consent to a substitution of Attorneys, the substitution is complete on notice given to the opposite counsel, no adjudication being necessary.

In this cause an *exception à la forme* was filed by the Defendant. A motion was made to reject it. At argument, Dunlop, C. J., urged the following among other grounds against Defendant's motion: That the motion now before the Court was made by "Loranger and Loranger," whereas the attorneys who signed the declaration were "Loranger et frères," and that no change of attorneys could take place without the permission of the Court. That Defendant's attorneys had been served with a copy of a motion of substitution, but until such motion was allowed, no change of attorneys could take place according to the Rule of practice of the Court, No. 20, and therefore the motion could not be received.

Per curiam.—In this case the Defendants filed an *exception à la forme* on the 28th January last. It was served on Plaintiff's Attorneys by a Bailiff who made his return in rather brief terms as follows: "I the undersigned Bailiff did on the twenty-eighth day of January, &c., serve the within exception on Messrs. Loranger, Attorneys." A motion was now made, signed by "Loranger et Loranger," to reject this *exception* on two grounds; first, because the service was not valid, as the Bailiff had made no election of domicile, and second, that as the Plaintiff's attorneys were now "Loranger et frères" "a service on Messrs. Loranger was no service." Defendant's counsel in reply contended that the firm had been "Loranger et frères," and that there had been no legal substitution of Attorneys: he had been served with a notice of substitution, but there had been no judgment of Court confirming the substitution, which therefore was not complete. The Court was of opinion that this was not a case where an election of domicile was necessary by the Bailiff. It was also evident that the Plaintiff's counsel had been properly served. When the Attorneys on one side consent to a substitution, the opposite party can have no interest in it; a notice of substitution to him is quite sufficient. No adjudication is necessary to complete the substitution.

Motion rejected.

Loranger et Frères, for Plaintiff.

Dunlop and Browne, for Defendant.

(J. L. M.)

MONTREAL, 1ST DECEMBER, 1862.

Coram MONK, J.

No 24.

Miles vs. Aspinall.

HOLD :—That on cause shewn, a Defendant arrested under *capias* will, on his own Petition, be allowed to give sufficient special Bail, after the eight days after day of return of cause and even at any reasonable time thereafter depending on cause shewn, and diligence made.

Defendant was arrested under *capias* at Montreal on the 5th September, 1862, and gave Bail to appear the 30th September 1862 (day of return of cause). On return of action an appearance was entered for Defendant who was foreclosed from pleading the 15th November. On the 20th November, Defendant petitioned the Court to be allowed to give good special bail according to provisions of Statutes L. C. Cap 87, Sec. 3, Page 809.

Perkins, J. A., submitted: Defendant was arrested the day of his departure for England, and only reached Father Point on his return the seventh of October, and set about, on his arrival in Montreal, to procure special Bail. Petitioner was disabled for days by sickness and now offers excellent Bondamen. That the Sec. 3, Cap. 87, Con. Stats Lower Canada, did not set the eight days *de rigueur*, and that under first Bond, the sureties were certain of being bound for debt and under recognizance of special only bound if debtor left Lower Canada before discharging his debt. The law gave the remedy and even a judge could extend the time, in this cause petitioner asked delay to enter recognizance and save his person from imprisonment. Counsel cited: Vallée, vs. Lefebvre et al, S. C. Montreal, 1860. (1) Campbell and Atkins et al, Quebec, before Court of Queen's Bench; appeal side. (2) Doherty for Plff. contra. The Sheriff has assigned the Bail bond, and the Court could not set aside or overlook such assignment. Defendant could not alone petition; but the Bail should have done so as in Vallée vs. Lefebvre et al. The delay of weeks made petitioner too late, and cause shewn was insufficient.

Monk, J. After *délibéré*, said: He was convinced that the decision in Campbell and Atkins, had given rise to delays in giving special Bail never intended by the legislature. He felt bound to follow that decision though he believed it was not according to the statute. In this case, cause shewn was good and it was immaterial whether Petitioner moved alone or with his Bail. In Vallée vs. Lefebvre et al., this Court had allowed special Bail to be entered even after judgment in the original cause, and an action against the Bondamen.—Petition granted, special Bail to be given within three days.

M. Doherty, for Plaintiff.

J. A. Perkins, jr, for Defendant and Petitioner.

(J. A. P.)

(1.) L. C. 9 Rep., p. 74.

(2) 9 L. C., Rep., p. 49.

CIRCUIT COURT.

MONTREAL, 24TH MARCH, 1863.

Coram MONK, J.

No. 164.

Johnson et al vs. Geoffrion.

Held:—That when an endorser of a Promissory Note has been discharged from his liability by the fact of the note not having been protested for non-payment after it became due, a subsequent verbal promise made by the endorser to pay the amount of the note notwithstanding his release may be proved by parole evidence, and binds the endorser.

2.—A promise to pay a note, made by the endorser who had been released by omission to protest, to the lawyer of the holder of the note, is as binding as if such promise had been made to the holder himself.

Per curiam.—The Defendant was the endorser of a promissory note which, not having been protested after maturity, he was by law discharged from his liability. After the note became due Defendant went to the Plaintiff's lawyer and said that he would not take advantage of his release arising from the note not having been protested. He was a man of honor, he would pay the note.

A few days afterwards, Defendant wrote a letter to the lawyer in which he stated that he would still be responsible for the payment of the note, if the maker did not pay it. This letter the lawyer burnt, not considering it necessary to hold it, as he considered the Defendant to be a man of honor. An action was taken against the makers of the note and a considerable sum was expended in costs, but without a successful result. Plaintiffs then brought this action against the endorser, who defended it on the following grounds: 1st. Because he had made no absolute promise to pay the note. 2nd. Because a promise to pay such a considerable amount could not be proved by *parole evidence*. 3rd. Because a promise made to the party's lawyer was not binding. The evidence shows that the first objection is unfounded: the testimony of the lawyer is positive that Defendant stated to him that he was a man of honor and would pay the note, and that Defendant also wrote a letter to the same effect which was destroyed. As to the second reason, it has been held in England that where the endorser of a note released by non-protestation, afterwards promises to pay such promise can be proved by *parole evidence*. In France such a promise could also be proved by *parole evidence*; there it would be held that there was a *commencement de preuve par écrit*. The third reason is unfounded: a party's lawyer is his agent; and a promise made to him is as good a promise as can be made. The Court knew the Defendant, and also believed him to be a man of honor, and had no doubt that even if this judgment had not been against him he would have paid the debt and costs.

Judgment for Plaintiffs.

J. A. Perkins, Jr., for Plaintiffs.

C. Archambault, for Defendant.

(J.L.M.)

Verbois
vs.
Saucier.

MONTREAL 18TH MAY, 1863.

Coram MONK, J.

No. 535.

Yon vs. O'Connor & O'Connor.

Opposant.

Held 1.—The mere allegation, in an opposition *afin de distraire*, by Defendant, that the goods seized form part of his [Defendant's] tools, or implements of trade, is insufficient to maintain such opposition.

2. It is not necessary for a Bailiff seizing, to allege in his *procès-verbal* of seizure, that he has left to Defendant the effects exempt by law.

The Plaintiff, having obtained judgment against the Defendant, took out an execution against his goods. The Defendant opposed the seizure on the following amongst other grounds.

1st. Because the articles seized in this cause, form part and portion of his tools, or implements of trade as tailor; and that several of them are necessary for the carrying on of his trade.

2nd. Because the Bailiff seizing in this cause, did not leave him the articles allowed or exempted by law, in virtue of the 3rd Section of the Consolidated Statutes for Lower Canada, chapter 85, and did not make mention thereof.

3rd. Because the Bailiff seizing should have specially alleged or set out that he had left to Defendant the goods, chattels, or effects exempt by law.

The Plaintiff having contested the opposition, it was decided by the Court,—That the opposant, who claimed certain articles as forming part of his tools or implements of trade, and, as such exempt by law from seizure, should have proved that such articles were necessary for the carrying on of his trade, and that the mere enunciation of it was not sufficient.

As to the third reason, it was no ground for opposition.

Opposition dismissed with costs.

L. Ricard, for Plaintiff.

Kerr & Nagle, for Opposant.

(L.R.)

MONTREAL, 30th APRIL, 1860.

Coram BADGLEY, J.

No. 6046.

Verbois vs. Saucier.

Held 1.—An inn-keeper has a right to detain the wearing apparel of a transient boarder for his board, i.e. where the boarder remains from day to day merely.

2. Where a boarder at an inn remained three weeks, without paying, the landlord had no right in law to retain his wearing apparel for his board.

3. An action *en revendication* brought by the boarder at an inn where he had remained three weeks without paying, against his landlord to revendicate his clothes which had been detained by the landlord as a security for the amount due him, is well founded.

Per Curiam.—This was an action *en revendication* brought by the Plaintiff for the recovery of his wearing apparel, which had been seized by the landlord of the inn where he lived. When a party remained from day to day merely, the landlord had a right to say that he could not take away his effects without paying. But in the present case, the party remained three weeks, and then the landlord kept the effects and would not give them up. The test of his right to

do so was, could they be sold under the Statute? The Statute declared that the creditor could not sell wearing apparel and certain other effects. The Defendant would, therefore, be ordered to give them up in five days, but without costs.

B. Devlin, for Plaintiff.

S. Rivard for Defendant.

(J. L. M.)

MONTREAL, 15TH MAY, 1863.

Coram MONK, J.

No. 1154.

Ryan vs. Minoque.

Held.—That a minor, who is married, can bring an action for wages for a sum exceeding \$25.

This was an action brought by a minor, being married, in his own name, for the recovery of wages, to the amount of seventy dollars.

The Defendant pleaded in accordance with 12 Vic. c. 98 s. 73, that the Plaintiff, not being of age, could not maintain an action for a sum exceeding twenty-five dollars.

The Plaintiff replied that under the common law of France a minor is emancipated by marriage, that as such he is entitled to sue for any amount where moveable property alone is concerned (*action mobilière*) and that the statute did not therefore apply.

PER CURIAM.—The court in giving judgment, said that the minor's not being of the full age of twenty-one did not effect his claim. Judgment accordingly for Plaintiff.

H. A. McCoy, for Plaintiff.

Dunlop & Browne, for Defendant.

(F. M. G.)

MONTREAL, 11th MARCH, 1854.

Coram Bruneau J.,

Nos. 22 and 601.

Garish vs. Duval.

Held.—That no rent can be recovered by an action at law, for premises leased for the purpose of keeping a house of ill-fame.

This was an action for £30 for rent.

The Defendant pleaded that the house had been rented to her for illegal purposes to wit for the purpose of keeping a house of ill-fame.

This fact having been proved; the action was dismissed with costs.

Per Curiam.—This is a good plea. This contract of lease is, in its face, an immoral contract, which no Court of Justice can sanction.—Pothier, *Traité du Contrat de louage*, No. 24.

La Cour après avoir entendu les parties par leurs avocats sur le mérite de ces deux causes réunies, avoir examiné la procédure, pièces produites et preuve et avoir sur le tout délibéré débouté, et déboute cette action, mais sans frais.

Action dismissed.

Dumas & Cherrier, Attorneys for Plaintiff.

Morrison, Attorney for Defendant.

(P. R. L.)

Garish
vs.
Duval.

Mogé
vs.
Latraverse.

ST. SCHOLASTIQUE 12 MAI, 1863.

Coram SMITH, J.

No. 186.

Birolean vs. Deronin,

JURÉ.—Qu'un billet à ordre, consenti pour dette de jeu est nul, quoique transporté à un tiers de bonne foi et avant échéance.

Le 2 Novembre 1862, le Défendeur signa un billet en faveur de V. Gratton payable sous 4 mois, à lui ou à son ordre, pour \$3, valeur reçue. Endossement par Gratton en faveur du Demandeur, pour valeur reçue.

Le Défendeur étant poursuivi pour le recouvrement de ce billet, a plaidé qu'il l'avait consenti au jeu de cartes en faveur de Gratton, que c'était pour cette considération qu'il l'avait signé.

La preuve établit qu'en effet Gratton, pendant qu'il jouait aux cartes avec le Défendeur, prêta \$3 à ce dernier qui continua à jouer, il fut prouvé aussi que le Demandeur ignorait ces faits quand Gratton lui transporta le billet et reçut bonne valeur pour le transport.

Per Curiam.—Le billet ayant une cause illicite et réprimée par les lois, est une obligation nulle et ne peut jamais être recouvrée en justice. Dans l'intérêt de la société et de la conservation des bonnes mœurs, il convient de décourager ces sortes d'engagements. Le billet est en conséquence déclaré nul.

Action déboutée.

Marcil, pour Demandeur.

Filion, pour Défendeur.

(c.o.)

DISTRICT DE RICHELIEU.

SOREL, 19 MAI, 1863.

Coram BADGLEY, J.

Mogé vs. Latraverse.

JURÉ.—Qu'une rente constituée en viager et à fonds perdu ne peut pas être considérée comme un contrat usuraire quelque exorbitante qu'en soit sa prestation.

Le Demandeur réclamait du Défendeur les arrérages d'une rente viagère constituée sur la tête de plusieurs membres de sa famille et à fonds perdu.

Le Défendeur plaida à cette demande par une exception au moyen de laquelle il prétendait que ce contrat était usuraire et frappé de nullité.

Badgley J.—Le Défendeur se plaint du taux exorbitant de cette rente et il plaide usure. Cette rente a été constituée en viager et à fonds perdu pour des deniers avancés au Défendeur et pour des intérêts alors échus ; et est constituée sur la tête de plusieurs personnes, et d'une manière successive ; mais néanmoins, le capital sera amorti et éteint au décès de ces différentes personnes. Le capital est de £30 et la rente annuelle est de \$32. Depuis sept ans le Défendeur a déjà payé £56 de rente. Il s'agit de savoir s'il y a une loi qui déclare un tel

NOTE.—Il semble que cette décision est contraire à celle rendue dans la cause de Wood vs. Shaw. 8 Jurist, page 180.

contrat usuraire. Cette rente a bien été constituée sous l'empire de la loi qui défendait l'usure, mais il faut observer que cette loi ne s'appliquait qu'aux prêts d'une somme d'argent, qui devait être remise et remboursée au prêteur; ou en d'autres mots, lorsque par le contrat le capital devait être remboursé au prêteur, cette loi recevait son application.* Dans le cas actuel, cette loi ne pouvait pas s'appliquer au contrat qui est soumis à la considération de la Cour, parceque ce n'est pas un prêt d'argent, en effet cet argent ne doit jamais être remboursé, il a été placé à fonds perdu d'une manière aléatoire; et une pareille rente viagère repose sur des combinaisons aléatoires qui la distingue essentiellement du contrat de prêt et du contrat de constitution de rente. Vide Troplong, Du Prêt nos. 421 et 500. Des Contrats aléatoires nos. 205, 230; et 283, 285, 322; où il expose clairement les principes de ce contrat de rente viagère qui est admis par nos lois. Ainsi le contrat en question en cette cause n'est pas usuraire et n'est frappé d'aucune nullité par les lois du pays et le Demandeur est fondé à en demander l'exécution†.

Jugement pour le Demandeur

La Frénaye & Bruneau, Avocats du Demandeur.

Olivier & Armstrong, Avocats du Défendeur.

(P.R.L.)

COUR SUPERIEURE.

MONTREAL, 30 AVRIL, 1863.

Coram BADGLEY, J.,

No. 2088.

La Compagnie de prêt et de dépôt du Haut-Canada,

Demanderesse.

vs.

Moyse Julien,

Défendeur.

AND

Stephen May,

Opposant.

Juge:—Qu'une opposition afin d'annuler la vente d'un immeuble, produite entre les mains du Shérif dans les quinze jours qui précèdent celui de la vente, ne peut pas être déboutée par une motion.

L'Opposant Stephen May avait produit, le treize d'avril dernier, dans les mains du Shérif du district de Beauharnois, une opposition à fin d'annuler, accompagnée de l'ordre d'un juge en chambre, s'opposant à la vente d'un immeuble fixée au seize du même mois.

Au terme de Mai, la Demanderesse fit motion que la dite opposition fut déboutée comme ayant été produite entre les mains du Shérif dans les quinze jours précédant celui de la vente, contrairement aux dispositions de la 15e Sec. chap. 85, Statuts Refondus du Bas-Canada, ordonnant que "aucune opposition à la vente d'un immeuble saisi par le Shérif sur un bref d'exécution, soit afin d'annuler la dite saisie, soit afin de distraire le tout ou partie des dits biens saisis, ou afin de charge ou servitude sur les dits biens, ne sera logée dans les mains du dit shérif ou reçue par lui, à moins que ce ne soit avant les quinze jours précédant celui fixé pour la vente et adjudication des dits biens."

* "For the loan or for bearance of money." Cons. S. of Canada, Chap. 58.

† Pothier, Constitution de Rente, ac. 234. Dumoulin, Des Usures, no. 244.

Ex parte
l'aradis.

A l'argument, *Mr. Henry Judah* pour la Demanderesse, soutint que cette section du statut renfermait une disposition absolue, contre laquelle un juge siégeant en Chambre, ni même une Cour de Justice, ne pouvait intervenir, en accordant même pour de bonnes raisons une opposition que la partie a fait défaut de produire dans les délais prescrits, et enfin il cita la décision rendue à Québec par la Cour Supérieure, dans une cause de *Quebec Building Society vs. Atkins*, rapportée au 9e volume des décisions des Tribunaux du Bas-Canada, p. 447.

Mr. Girouard pour l'Opposant, soutenait au contraire que le Statut n'avait pas eu l'intention d'enlever à une partie, qui a des droits incontestables de s'opposer à la vente d'un immeuble saisi, tous moyens d'obtenir justice; que la partie peut en tout état de cause s'adresser à un juge de la Cour Supérieure, lequel après avoir pris communication des moyens d'opposition, l'accorde ou la refuse à sa discrétion; que s'il en était autrement, il en résulterait souvent de grandes injustices, et il finit par invoquer la pratique du district de Montréal passée en jurisprudence, reconnaissant au Juge le pouvoir discrétionnaire d'accorder une opposition à la vente d'un immeuble, dans les quinze jours précédant celui fixé pour la vente.

Per Curiam.—Il ne s'agit pas ici de décider sur les moyens d'opposition invoqués par l'Opposant, la Cour ne pouvant prononcer sur le mérite qu'après contestation liée. Supposant donc que les moyens d'opposition invoqués sont bien fondés, le Juge qui l'a accordée en Chambre, dans les quinze jours précédant celui fixé pour la vente avait-il pouvoir de le faire? Je n'hésite pas à me décider dans l'affirmative; la pratique de ce district a toujours en effet reconnu au Juge un pouvoir discrétionnaire dans ces cas; et ce serait commettre souvent une grande injustice aux parties que de leur refuser le moyen de faire valoir leurs droits.

*Motion renvoyée.

Mr. Henry Judah, Q. C., pour la Demanderesse.

Mr. Girouard, pour l'Opposant.

D. G.

MONTREAL, 29TH APRIL, 1854.

Coram Day, J., Smith, J., Mondelet, J.,

No. 635.

EX PARTE, PARADIS,

for a writ of *Scire facias*.

Held:—That the writ of *Scire facias* to cancel Letters Patent can only issue at the suit of the Crown.

The Applicant on the 17th April, 1854, moved: that upon the affidavit herewith produced and filed, her Majesty's writ of *Scire facias* do issue and such further proceedings be thereupon had according to law, in order that her Majesty's Letters Patent, issued at the City of Quebec, on the twentieth day of June, one thousand eight hundred and fifty-three, under the great seal of this Province, to and in favor of Charles Seraphin Rodier of the said City of Montreal, in the said District, Builder, referred to in the said affidavit and an exemplification thereof is of record in the office of the Prothonotary for this District of the Superior Court, be repealed, cancelled, and adjudged and de-

* La demanderesse a appelé de ce jugement.—Note du Rapporteur.

clared void, unless cause to the contrary be shewn by the said Charles Seraphin Rodier, on the twenty-second day of April instant, or on such other day as this Honourable Court may appoint, sitting in superior Court in the Court House in this City at the hour of half past ten o'clock in the forenoon, the whole with costs.

PER CURIAM:—This application can only be made at the instance of the crown, and not at the instance of any individual or private party.

The judgement of the Court is as follows: The Court, having heard the said Joseph Paradis upon his motion of the 17th April, instant, for a writ of *scire facias* to repeal the Letters Patent in the said motion mentioned and set forth, having examined the affidavit produced with the said motion, and having deliberated, doth reject the said motion.

Carter, attorney for Petitioner.

(P. R. L.)

MONTREAL, 31st MAY. 1854.

Coram DAY, J., SMITH, J., MONDELET, J.

No. 1088.

Dandurand et ux. vs. Pinsonnault.

Held:—That damages will be awarded for injury by the bite of a dog inflicted upon a person who was at the time upon the Defendant's land, but not with the *animus* which constitutes a trespass.

PER CURIAM.—This is an action for damages resulting from the injury sustained by the Plaintiff's wife by the bite of a dog belonging to the Defendant, which inflicted upon her so severe a wound that the physician who has attended her, feared at one time, it would be necessary to amputate the limb. The only defence given by the Defendant is, that the Plaintiff's wife was at the time of the accident on the Defendant's land. The facts of the case as proved show that it occurred early in the spring, and that she had stepped out of the road and walked near the Defendant's barn to escape from the mud.

This was no trespass, any more than it is a trespass for a neighbor to go on a man's land to make a call. The *animus* which constitutes a trespass according to law was wholly wanting.

The question, in this case, upon the facts proved, then, is simply this, has a man a right to keep a dangerous dog to protect his property? He has, no doubt; but it is at the risk of being liable to pay the last farthing of damages for injuries done to innocent persons.

The court will always hold this doctrine in such cases as being the law and will never sanction the idea that for the mere chance of catching a thief, a man is to expose his neighbor to danger. The doctor's bill amounts to £22; and, taking into consideration the pain suffered by the Plaintiff's wife, the whole damages awarded are £50. La Cour condamne le Défendeur à payer au Demandeur £50 de dommages causés à la dite Rozalie Picard par la morsure infligée par le chien appartenant au dit Défendeur.

Loranger, Attorney for Plaintiffs.

Tugault, Attorney for Defendant.

(P. R. L.)

Dandurand
vs.
Pinsonnault.

Bad law.
See Entick
v Carrington
19 St. Tr. 4
p. 1066.

COURT OF QUEEN'S BENCH, 1863.

FROM THE SUPERIOR COURT—DISTRICT OF MONTREAL.

IN APPEAL

MONTREAL, 1st JUNE, 1863.*Coram* ATYLWIN, J., DUVAL, J., MEREDITH, J., MONDELET, J., BERTHELOT, J.

THOMAS McVEIGH

Defendant in the Court below,

AND

FELIX LUSSIER

Plaintiff in the Court below.

Held:—If five lots of land have been sold in one lot *en bloc* and for one price, and the purchaser has only obtained possession of four of them, the said purchaser being sued for the balance of the purchase money, is well founded in pleading that the lot not delivered to him is worth a larger sum than the rest of the lots, and that therefore he is entitled to have the value of such lot deducted from the original price of the five lots.

The facts of this case are fully reported, 6 L. C. Jurist 188, 9, where the judgment of the Court below appears.

The Defendant appealed from that judgment, and his appeal was maintained by the Court of Queen's Bench.

The following are the observations made by the judges in appeal.

MEREDITH, J.

The Respondent, by a notarial deed bearing date the 12th day of July, 1852, sold to the Appellant five lots of land in the township of Litchfield, which are described in the said deed of sale as follows: "all and singular the certain lots being composed of lots no. 12, 27, and 28, in the first range, and lot no. 22, in the third range, and lot no. 20 in the fourth range, all these lots situated in the said township of Litchfield, in the said county of Ottawa and district of Montreal, containing nine hundred and thirty-four acres of land, and usual allowance for high ways with all and every the members and appurtenances thereto belonging."

The part of the deed which has reference to the price is in the following words: "The present bargain and sale is so made in manner as aforesaid for and in consideration of the sum of £140 cy. in deduction, and part whereof that is to say £70 said currency were paid at the passing and execution of these presents. And as to the balance or sum of £70 the said purchaser doth bind and oblige himself his heirs and assigns to well and truly pay or cause to be paid to the said vendor his heirs and assigns—in twelve months from this day without interest."

The action in the Court below was for the recovery of the said sum of £70, balance remaining due upon the price of the said five lots of land. The Appellant, by his plea, alleged that the Respondent had failed to put him in possession of one of the five lots: namely, lot no. 22, in the third range of Litchfield, containing 200 acres; that that lot had been in possession of certain persons named in the Appellant's plea, under title, since the year 1838; that it was impossible for the Appellant to obtain possession of it; that it was worth at the

time of the sale £120; and that the Appellant had a right to have that sum, the value of the said lot, deducted from the *prix de vente*.

It is not contended that the Appellant has been put in possession of the said lot no. 22: and the main question submitted for our consideration at the argument, was as to the principle to be adopted in determining the deduction from the price, to be made in favor of the Appellant.

The pretension of the Respondent is expressed succinctly and at the same time clearly, in his factum, in the following words: "cinq lots ont été vendus, il en manque un, le vendeur n'est tenu qu'à la remise d'un cinquième du prix, de même, qu'il ne serait tenu que de remettre le cinquième du terrain qui manque. Cette proposition est claire et bien définie en loi."

There are doubtless cases in which the rule contended for by the Respondent would be applicable. For instance if a farm containing 500 arpens were sold at Sheriff's sale as containing 600 arpens; the adjudicataire, under ordinary circumstances, would be entitled to a diminution in the price to the extent of $\frac{1}{10}$ th. and to no more; because in the case supposed no reason could be assigned for setting a higher price upon the land deficient, than upon that forth coming. But in the case before us it is proved that there was at the time of the sale a great difference in the quality of the soil and consequently in the value of the lots sold, according to the evidence, of some of the witnesses, the lot not delivered was equal in value to two of the lots delivered; and assuming those delivered to be of equal value, then, with reference to the real value of the lands sold, the Appellant has received, but three fifths of what he purchased, whereas according to the pretensions of the Respondent, and the judgment of the Court below, the Appellant must pay four fifths of the whole of the price. To me it appears, that under the particular circumstances of the case before us, in determining the deduction to be allowed to the Appellant, we must take into consideration the *value* of the land delivered, and the *value* of the land not delivered; and not merely the superficial contents of what was delivered, and of what was not delivered. As elucidating my views I suppose two lots of land, of equal size, the one worth £500, and the other £100, to be sold together for £600. If the seller were shewn to have had no right to sell the more valuable of the two lots: it would hardly be contended that the purchaser could be compelled to pay £300, for the lot worth £100, and yet, in principle, there is no difference between the case supposed and the case before us.

The Respondent with reference to this view of the case argues in his factum as follows.

"Mais, dit-on, le lot en question vaut à lui seul plus que tout le reste, et sans cette circonstance, l'Appellant n'aurait pas acheté. Cela peut-être, mais tournons la thèse, et supposons que le lot fut inférieur en valeur au cinquième du prix, est-ce que McVeigh n'aurait pas eu le droit d'exiger une diminution d'un cinquième de son prix et que Lussier n'aurait pu prétendre ne faire déduire que la stricte valeur du lot? Supposons qu'au lieu de valoir £28, le lot No. 22 ne vaudrait que £5, dira-t-on que Lussier ne serait tenu que de remettre les £5, et non un cinquième du prix et qu'il ne pourrait pas opposer cette différence dans la valeur du lot, et que l'acquéreur ne pourrait pas exiger le remboursement du cinquième du prix? non, telle n'est pas la loi.

McVeigh
and
Lussier.

McVeigh
and
Lester.

The putting of the questions in this form does not throw any additional light upon the point under consideration; and according to my view if £5 bears the same proportion to £140, that is to say to the whole of the price, that the value of the land not delivered, bears to the value of the whole of the land sold, then £5, would be the amount of the deduction to which the appellant would be entitled. Turning again to the hypothetical case already mentioned if the seller had delivered the lot worth £500, and, without any bad faith on his part, had failed to deliver the lot worth £100: according to the pretensions of the Respondent, the purchaser would have a right to keep the lot worth £500, on paying £300—which I hold to be impossible.

Pothier speaking of the case of an adjudicataire says, Proc. Civ. :—

“Quoique l'adjudicataire, n'ait pas en ce cas une action de garantie, il est néanmoins équitable, qu'il ait au moins une action pour la répétition du prix qu'il a payé, ou en total, s'il souffre éviction du total, ou à proportion de la perte dont il souffre l'éviction.”

The rule thus laid down appears to me applicable to the present case.

The purchaser is entitled to a deduction “à proportion de la perte dont il souffre éviction”—but, as I have already said, the loss sustained by the appellant is not to be measured with reference solely to the superficial contents of the lot not delivered, but by ascertaining the difference between the value of the land that ought to have been delivered to the appellant and the value of the land that has been delivered to him, taking as the value of the whole, the price mentioned in the deed between the parties;—and for this purpose it appears to me that an *expertise* should have been ordered.

There are cases in which a purchaser evicted is entitled to the actual value of the property taken from him; but what the appellant contends for as is expressly stated in his factum is the value of the lot not delivered “as compared with the whole of the lots delivered” and under the circumstances of the present case I am clearly of opinion that to that extent the exceptions of the Defendant ought to be maintained.

I therefore agree with the others members of this Court in thinking that the judgment of the Court below must be reversed. They however think that the value of the lot of land of which the appellant has not been put in possession is established to be about £70; and they think it better to award that sum to the appellant than to order an *expertise*.

It is obviously of importance that a Judgment should be rendered which will put an end to the litigation between the parties; and as the sum of £70 is about the sum which I think the appellant is entitled to claim for the lot of land not delivered, I do not think I ought to dissent from a Judgment awarding him that sum; although according to my view a *Ventilation* would be the more regular course.

BERTHELOT, J.

Lors de la vente par décret du 20 Mars 1850 par le shérif du District de Montréal, l'Intimé a acheté 234 acres, Township de Litchfield, District de Montreal, étant les Nos. 12, 27 et 28 du 1er rang, No. 22 du 2me rang et le No. 20 du 4me rang pour £180 0 0.

Le 12 Juillet 1862, Labadie Notaire, l'Intimé a vendu les nos. 12, 27 et 28 du 1er rang, no. 22 du 3me rang et no. 20 du 4me rang à l'Appelant pour un seul et même prix £140.

£70 0 0 furent payés comptant et £70 0 0 stipulés payable dans un an, mais sans intérêt.

C'est pour le paiement de ces £70 0 0 avec intérêt du 12 Juillet 1863 que la présente action est intentée avec intérêt du 12 Juillet 1863.

L'appelant a plaidé qu'il n'avait pu avoir la possession du lot 22 du 3me rang, lequel allègue-t-il valait £120 0 0 au temps de la vente et qu'il avait le droit de faire déduire cette somme du prix de la vente et conclut à ce qu'elle soit déclarée éteinte la balance restant due et que l'action de l'Intimé soit déboutée à moins que lui l'Appelant ne fut mis en possession du lot no. 22 3me rang:

Par une demande incidente, l'Appelant élève les mêmes prétentions que par son exception et conclut au paiement de £150 0 0 à défaut par le Demandeur de le mettre en possession de ce lot no. 22 du 3me rang.

L'Intimé à répondu que l'Appelant aurait pu être mis en possession du lot en question, et avait même poursuivi le nommé Thompson en possession d'icelui, mais qu'il avait abandonné cette action, et que le Défendeur ayant acheté 934 acres en bloc ne pouvait réclamer une diminution du prix que proportionnellement au prix d'achat et à la superficie du lot qui lui manquait et ce irrespectivement du plus de valeur que ce lot pouvait avoir sur les autres.

La preuve a été faite au moyen d'une commission rogatoire exécutée au Portage-du-fort, et il est constaté que les nommés White & Thompson étaient en possession du dit lot no. 22, dès avant la vente par décret du 20 Mars 1850; que White avait un certificat de *patente* pour le dit Sud Est du dit lot en date du 25 Avril 1850. Et qu'il avait vendu le tout à Driscoll dès 1838.

Il est constaté satisfactoriement que l'Appelant n'a pu avoir la possession de ce lot, lequel depuis le temps était possédé à titre de propriétaire par d'autres que son vendeur l'Intimé. Il semble avoir été admis par les parties lors de l'argument que la seule difficulté est de savoir si l'Appelant a le droit de demander une diminution du prix à raison de la superficie seulement qui lui manque sur les 934 acres ou bien à raison de la valeur de ce lot, eu égard à tous les autres lots.

La Cour Supérieure semble avoir adopté le principe que c'était une vente *en bloc* proprement dite, tandis que c'est la vente de 5 lots différents, de différente superficie, et situés dans des différents rangs, il est bien vrai pour un seul et même prix mais cela ne repousse pas la possibilité que l'un des 5 lots pouvait à lui seul valoir autant que les 4 autres, soit à raison du sol ou des pouvoirs d'eau, et je ne vois pas comment il serait contraire aux principes qui régissent les droits du vendeur et de l'acheteur dans tout contrat de vente que dans le cas actuel il soit fait diminution sur le prix de vente à raison de la valeur réelle et particulière du lot que l'Intimé ne paraît pas pouvoir livrer à l'Appelant son acheteur. L'Intimé semble lui-même avoir reconnu ces principes puisque dans ses réponses il conclut qu'au moins il soit ordonné une ventilation. Il deviendrait peut être nécessaire de nommer des experts pour établir la valeur de ce lot no. 22, 3me rang, pour qu'il en soit fait déduction du prix, à moins toutefois que la preuve ne nous

McVeigh
and
Lussier.

paraître suffisante pour en fixer non-moins la valeur pour éviter par là à l'Intimé les frais d'une expertise.

Je crois que l'on peut se fixer là-dessus en s'en rapportant au témoignage de F. X. Bastien l'agent de l'Appelant, spécialement autorisé à passer le contrat pour l'achat des lots en question, et depuis, pour parvenir à un règlement avec l'Intimé. Il a répondu au 8me interrogatoire que le lot no. 22 valait à raison de 10s. l'acre ce qui ferait près de £68 pour le tout.

D'après ce témoignage je serais disposé à dire que l'Appelant qui était sur les lieux lors de son achat (qui a dû et pu savoir et connaître les actes de possession sur le lot en question par White et Durell) ne devrait pas être admis à avoir plus que ce qu'il a pu, lui ou son agent *ad hoc*, regarder comme étant la valeur de ce lot au temps de son achat. Et comme ce lot n'a que 136 acres suivant le témoignage de Eliaba Brennan, je ne pense pas que l'Appelant puisse avoir droit à plus de \$236 ou £68 ce qui éteindrait à peu près la demande, et rien de plus.

Quant aux dommages l'Appelant ne peut en réclamer dans les circonstances de la cause. Le témoin Bastien était non seulement l'agent de l'appelant pour l'achat des lots en question, mais aussi agent du Gouvernement pour les terres de la couronne dans le District d'Ottawa, je reçois son témoignage avec presque autant de créance que j'ajouterais au rapport d'un expert que la cour nommerait.

L'Appelant ne pourra se plaindre si on le juge d'après l'estimation de son agent.

Je suis donc d'avis qu'en faisant diminution des £68 00, ou £70. 00 étant la valeur du lot no. 22 du prix de la vente, l'on déclare l'action du Demandeur éteinte et qu'il soit condamné avec frais de l'action et de l'appel, et l'Appelant condamné aux frais de sa demande incidente qui étaient inutiles.

The judgment in appeal was recorded in the following terms:

Seeing that the Respondent, by a notarial deed of sale, bearing date the twelfth day of July, one thousand eight hundred and fifty two, sold to the appellant five lots of land in the township of Litchfield, which are described in the said deed of sale as follows: "all and singular the certain lots of land being "composed of lots numbers twelve, twenty seven and twenty eight in the first "range, and lot number twenty two in the third range, and lot number twent. "in the fourth range, all these lots situated in the said township of Litchfield "containing nine hundred and thirty four acres of land and usual allowances "for high ways."—The said sale having been so made, as appears by the said deed for and in consideration of the sum of one hundred and forty pounds; in deduction, and as part whereof, seventy pounds was paid at the passing of the said deed of sale, the remainder of the said price, to wit seventy pounds, being payable under the said deed twelve months after the date thereof.

Seeing also that the Respondent, although often requested to put the appellant in possession of one of the lots of land, so sold, to wit of the lot number twenty-two in the third range of Litchfield, has wholly failed to do so, and that it hath not been in the power of the appellant to obtain possession of the said last mentioned lot of land.

Seeing also that although, the said sale was a sale of five lots of land, yet that the said five lots were not lots of equal value, and on the contrary that the said lot number twenty-two was of much greater value than any of the other lots mentioned in the said deed of sale, and was at the date of the said deed of sale worth the sum of seventy pounds currency.

Considering that the said Appellant had a right to have the said sum of seventy pounds, deducted from the price or consideration money mentioned in the said deed of sale; and therefore that in the judgment of the Court below which allows the Appellant the sum of twenty-eight hundred pounds currency only on account of the non-delivery to him of the said last mentioned lot of land, there is error; doth in consequence reverse the said judgment to wit the judgment rendered by the Superior Court of Montreal in this cause, on the twenty-seventh day of march one thousand eight hundred and sixty-two, and, proceeding to render the judgment which the Court below ought to have rendered in the premises doth declare, that the said Appellant has a right to have the value of the last mentioned lot of land, to wit the said sum of seventy pounds deducted from the price mentioned in the said deed of sale, and considering that after deduction being made of the said last-mentioned sum of money from the said price or consideration money mentioned in the said deed of sale, there is no balance due by the Appellant to the Respondent; doth in consequence dismiss the action of the said Respondent and doth condemn the said Respondent to pay to the Appellant his costs as defendant in the Court below including all the costs of his enquête. And as regards the incidental demand in the court below, the same is hereby dismissed with costs in favor of the Respondent against the Appellant; and the Court doth condemn the Respondent to pay to the Appellant his costs in this court; &c.

Baudry
vs.
Thibodeau.

Appeal maintained.

A. & W. Robertson for Appellant.
Moreau, Ousimet & Chapleau for Respondent.
(r. w. r.)

COUR DE CIRCUIT.

MONTREAL 30 MAI 1863.

Coram SMITH, J.

No. 302.

Baudry vs. Thibodeau.

Jugé:—Que dans l'espect, par la nature des conclusions prises par le Demandeur, il y a excès de juridiction rationis materis.

Le Demandeur réclamait par son action £81, 5, 0 pour un quartier de loyer échû le 1er Novembre 1862; £7, 13, 4 pour cotisations et £11, 1, 8 pour certains dommages, formant en tout £99. Les conclusions prises par le Demandeur sont comme suit;

"Pourquoi le Demandeur se réservant tout recours qu'il pourrait avoir contre le Défendeur pour dommages ultérieurs, conclut à ce que le Défendeur soit condamné à faire enlever les obstructions dans le canal et l'évier sous tel délai

Easton
vs.
Easton.

" qu'il plaira, à cette cour fixer, sinon et le dit délai passé, permis au Demandeur de les faire enlever aux frais du Défendeur, qu'inhibitions et défenses soient faites à ce dernier de méuser de la propriété louée, et de jeter et laisser jeter désormais dans la fosse d'aisance et l'évier quoique ce soit de nature à les obstruer et à ce que le Défendeur soit condamné à payer au Demandeur la dite somme de cinquante livres, dit cours, avec intérêts et dépens.

Le Défendeur ayant hors de l'audition au mérite exciper de la juridiction de la Cour *ratione materias*, le Demandeur fut débouté de son action avec dépens.

R. Roy, Avocat du Demandeur.

La Frenaye & Armstrong, Avocats du Défendeur.

(P. R. L.)

St. R. C. Ch. 77. Seb. 35 ch. 69 Sec. 2 ch. 82 sec. 2.

6 L. C. Jurist p. 35 exparte Desparois, No. 1865 Beninger vs. Nagle, jugement 28 Fév. 1861, C. C. 2 Carré et Chauveau p. 183.

MONTREAL, 31st MARCH, 1863.

Coram MONK, J.

No. 1213.

Easton vs. Easton.

Held—1st. That a draft of deed of ratification of donation, filed by plaintiffs as an exhibit, and which (or one to the like effect) it is demanded that the defendants do execute, may be taken cognizance of, and adjudged upon by the Court without the said draft being detailed at length in the declaration or other pleadings.

2nd. That a deed of donation being valid, a promise therein contained to ratify the same at a certain time is obligatory and cannot be avoided on the ground of there being no consideration for such promise.

The immediate object of this action was to compel the ratification of a deed of donation. The property donated was at the time of the donation subject to a usufruct continuing during the lifetime of the *usufruitiers*. The donors bound and obliged themselves to ratify, confirm, and renew the donation within eight days after the death of the *usufruitiers* but, though duly required, failed and neglected to do so. The plaintiffs by their declaration prayed that the defendants might be adjudged and condemned within a delay to be fixed by the court, to make and execute in due and legal form at the costs and charges of the plaintiffs, a good and sufficient deed of ratification in the form of the draft which the plaintiffs produced or in such other form as would satisfy the said undertaking and agreement, failing which that the donation be declared and adjudged to be ratified and confirmed in all its conditions, &c., &c.

Mr. Doherty for defendant, William Easton (the only defendant contesting the action) demurred on the ground that it did not appear of what the draft of a deed of ratification claimed by plaintiffs consisted, the same not having been set out in the declaration, and that the Court could not pronounce any judgment whatever on any matter not set forth in the declaration or other pleadings. And because no cause or consideration was alleged as having been given by plaintiffs to this defendant, entitling them to the ratification claimed by the action, such promise was therefore a *nudum pactum* and could not be enforced

in law. The Court, however, considered Mr. Doherty's objections invalid and held that the plaintiff's declaration contained all that was essential, there being no necessity for setting forth at length in any of the pleadings the draft of deed of ratification filed by plaintiffs. And with regard to the second objection, the Court was of opinion that as the original deed of donation was valid, the promise to ratify the same was binding.

Shelton
vs.
Kerns.

Demurrer dismissed with costs.

R. & D. Leach, for Plaintiffs.

M. Doherty, for Defendant, William Easton.

(D. S. L.)

SUPERIOR COURT.

MONTREAL, 20TH APRIL, 1863.

Coram MONK, J.

No. 1560.

Shelton vs. Kerns et al., and A. T. Holland,

mis en cause.

HELD:—1st. When the defendant in an action of *saisie gagerie* has become guardian of the effects seized, he is not bound by law to oppose the sale of said effects under another seizure. 2nd. That, although the guardian of effects seized is not bound by law to oppose their sale under a second seizure, yet he may do so.

In this case the plaintiff obtained judgment for the amount of his rent and the *saisie gagerie* of the defendant's effects was declared good and valid. Andrew T. Holland, one of the defendants, was appointed guardian of the effects seized.

Some time after judgment the plaintiff proceeded to sale, and the bailiff made his return that the effects seized had disappeared. The plaintiff thereupon took out a rule against the guardian ordering him to produce the goods or their value, or in default of his so doing to shew cause why he should not be declared *contrainte par corps*.

The guardian appeared, answered the rule and declared that he was unable to produce the goods because they had been sold out of his possession under a Writ of Execution in another cause wherein one Austin Adams was plaintiff, and that he was no longer responsible.

To this answer the plaintiff filed an answer in law, by which he raised two law points:—1st. That the guardian was bound by law to have opposed the sale under the second seizure of the effects of which he had charge; 2nd. That he was also bound by law to notify the plaintiff of the second seizure which endangered the safety of the effects on which he the plaintiff had a special privilege.*

The case was argued on the law issue and taken *en délibéré* when the defendant's counsel appeared with a motion to be allowed to amend his answer to the effect that the guardian had notified the plaintiff of the second seizure on the

* Pigeon, Vol. 1, p. 618 624, L. C. R., p. 158, *Langlois vs. Gauvreau*. L. C. R., p. 495, *Smith O'Farrell & Coleman*, opposant.

Warren
vs.
Douglas

effects first seized by him. This motion was granted and the parties went to proof.

The Court in giving judgment said, "It was quite true the defendant might have made an opposition to the second seizure, but he was not *bound* to do it." The Court did not rule on the second law point, considering that the evidence showed that the plaintiff had been notified of the second seizure.

J. L. Morris, for Plaintiff.

J. & W. A. Bates, for Defendants.

(J. L. M.)

CIRCUIT COURT.

MONTEAL, 18TH MAY, 1863.

Coram MONK, J.

No. 454.

Warren vs. Douglas & Smith,

Opposant.

Held:—That when a guardian has opposed a sale, under a second seizure of the effects over which he is guardian, his right to make such opposition cannot be tested by a motion, but ought to be tried on a law pleading.

Resemble. A guardian is bound to oppose the sale, under a second seizure, of the effects over which he has been appointed guardian.

Per Curiam.—An execution having been taken out, Smith was named guardian of the effects seized. While guardian, a second execution issued against the same effects, and was carried on, Smith being appointed guardian to the second also. The first was either suspended or delayed. Seeing that a sale was about to take place, Smith, as guardian, put in an opposition. The Plaintiff moved to reject it on the ground that the guardian could not oppose the sale, and that the reasons of the opposition were null and void. The question arose, could a guardian oppose the sale of the effects under his care? The Court had looked into the decisions, and found six one way, and five the other; by judges of equal authority. Only one case had gone to appeal, and the Court of appeals appeared to hold that the guardian not only had right to put in an opposition, but was perhaps bound by the obligations of his office to do so. It was time that the procedure should be settled; and if this rule were to be carried out, it was evident that the opposition in this case was good.

The Court suggested that it would be better to bring the point upon a law pleading, as it was a question of law. A question of law could not be raised by a motion of this kind.

Motion rejected.

Kerr & Nagle, for Plaintiff.

J. J. Curran, for Opposant.

(J.L.M.)

PRIVY COUNCIL.

Present :—LORD CHELMFORD, SIR J. L. KNIGHT BRUCE, AND SIR J. T.

COLERIDGE.

FEBRUARY 21st, 1863.

The Great Western Railway Company of Canada,

APPELLANTS.

Jane Fawcett,

RESPONDENT.

The Great Western Railway Company of Canada,

APPELLANTS.

Margaret McKay Braid,

RESPONDENT.

RAILWAY COMPANY—NEGLIGENCE—CONSTRUCTION OF THE LINE—*Onus probandi*—MISDIRECTION.

Held :—1st That where an injury is alleged to have arisen from the improper construction of a railway, the fact of its having given way will amount to *prima facie* evidence of its insufficiency ; and this evidence may become conclusive from the absence of any proof on the part of the Company to rebut it.

2nd That a Railway Company, in the formation of their line, are bound to construct their works in such a manner as to be capable of resisting all violence of weather which, in the climate through which the line runs, might be expected, though perhaps rarely, to occur.

3rd In an action against a Railway Company to recover compensation for injuries resulting to a passenger from an accident caused by the giving way of a portion of the Company's Railway, it was proved, on behalf of the Company, that they had always employed skilful engineers in the construction of their works, and that the giving way of the Company's Railway was caused by a storm of unusual violence. The judge, in directing the jury, never explained to them the effect of such evidence upon the question of negligence. That the jury ought to have had their minds distinctly and pointedly directed to this question.

These were two appeals from the judgment of the Court of Error and Appeal of Upper Canada. The causes of action in both cases arose out of an accident which happened on the Appellants' railway on the 19th March 1859. In each case the action was brought by a widow, as the personal representative of the husband, to recover compensation for the benefit of herself and children. In the first case, an action was brought by Jane Fawcett to recover compensation for the loss sustained by the death of Thomas Fawcett, which took place whilst travelling on the Appellants' railway on the 19th March, 1858, when a part of the embankment on which the railway was laid gave way during a violent storm which then occurred ; the engine of the railway train was thrown into the breach thus created in the embankment, and Thomas Fawcett was killed. The deceased was travelling as a passenger for hire, and it was alleged by the Respondent, that the accident was attributable to the Appellants' having their railway, and the switches, bridges, embankments, culverts, drains, and gutters thereof unskilfully and improperly placed, built, and constructed of insufficient materials and size, and to negligence, and want of skill and caution, in the carrying and conveying the deceased, and in conducting, managing, and directing the carriage in which he was a passenger, and the train to which the carriage was attached, and the locomotive by which the train was drawn.

The defence was, that there was no such breach of duty, or want of skill or care, on the part of the Appellants, as alleged. The cause was tried at Hamilton, the 31st October, 1859, before Sir J. B. Robinson, C. J., of Upper Canada.

Great Western
Railway Co.
and
Jane Fawcett.
and
Margaret
McKay Braid.

It was admitted that the deceased, Thomas Fawcett, was a passenger in the train from Paris (in Canada) to St. Catherines, and was killed by the accident which happened on the 19th March, 1859, in that part of his journey which lay between Hamilton and Copetown. It appeared by the evidence that the railway between Hamilton and Copetown, at the place where the accident happened, and for some distance in both directions, is carried along an embankment raised on and run along a mountain side, the mountain on the upper or north side of the embankment rising to a height far above the top of the embankment, the level of which was about twenty-five feet above the ground on its north side, and about sixty feet above the ground on its south side. On the morning of the 19th March, 1859, at about two o'clock A.M., the train in question, travelling at about ten miles an hour from Copetown to Hamilton, reached the place of the accident. The embankment to within about twelve feet from the ground on the north side had previously given way, and fallen over to the south side, leaving a gap of about forty-five yards, into which the engine fell, and so Fawcett was killed. Loaded trains had passed safely over the place of the accident, one within an hour of the time when it took place, and two others within the two or three hours preceding. At those times all appeared safe, and there was nothing to attract attention. The weather had been wet for two or three days previously, the winter's frost was coming out of the ground, the night in question was very stormy, and from six o'clock in the evening of the 18th March, there had been an excessively heavy rain.

The witnesses on both sides agreed that the rain caused the embankment to give way, but in what manner it acted was left entirely to conjecture and in uncertainty. No evidence was given of any negligence, or want of caution, care, or skill, in carrying or conveying Fawcett, or in conducting, managing, or directing the carriage train or locomotive, or of defects in the materials used in constructing the embankment or railway works; but the Respondent called witnesses for the purpose of proving negligence or want of skill in the construction or maintenance of the works. At the close of the Respondent's case, it was objected on behalf of the Appellants, that as the evidence shewed that the Appellants employed competent engineers, the negligence charged against them was negatived. But the learned judge ruled, that the question of negligence or no negligence must go to the jury, and that the question was whether a ditch was necessary at a certain part, and whether such a ditch was either never made, or, if made, was not properly maintained, so as to protect the embankment from water; that they, like other servants of the Appellants, might fail in doing their duty; and if they did, the Appellants must answer for injuries occasioned to others by such neglect. The judge having so ruled, the Appellants called witnesses on their behalf, for the purpose of showing that there was no want of care, or skill, in the construction of the railway and embankment; that the culverts and drainage were sufficient; that the Appellants employed competent and skilful engineers, and spared no expense in the construction and maintenance of the railway; that the railway had been used for about four years, without any suspicion of insecurity and was considered perfectly safe by first rate engineers, and that it was inspected daily; that the em-

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bankment was repeatedly inspected by competent surveyors and engineers, and that all precautions had been taken to provide against such dangers as could reasonably be foreseen, and that the storm which occurred about the time of the accident was of a most extraordinary and unprecedented character. The jury found a verdict for the Respondent, with damages 5,000 dollars. In the following term, the counsel for the Appellants obtained a rule nisi, in the Court of Common Pleas for Upper Canada, for a new trial, on the ground of misdirection and on the ground that the verdict was against law and evidence. In Hilary term cause was shewn against the said rule, and it was discharged; but the Chief Justice of the Court of Common Pleas was of opinion that the verdict was against the weight of evidence, and in that respect he differed from the other two judges who heard the case. Judgment was on the 27th March, 1860, entered for the damages and costs, being 5419 dollars and 16 cents. Against that judgment the then Defendants appealed to the Court of Error and Appeal for Upper Canada. The appeal came on to be heard before the said Court of Error and Appeal on the 27th December, 1860, and on the 23rd January, 1861, judgment was delivered to the effect, that the Court was of opinion that the directions were proper, that the verdict was supported by evidence, and that the majority of the Court were of opinion that the judgment was not against the weight of evidence. The judgment appealed from was therefore affirmed. The Appellants having obtained leave from the said Court of Error and Appeal to appeal to her Majesty in her Privy Council, and having complied with the terms on which the appeal was allowed, now appealed accordingly.

In the second case, an action was brought by Margaret McKay Braid, the widow and personal representative of Alexander Braid, for the loss sustained by the death of the said Alexander Braid, which occurred whilst travelling on the Appellants' railway, at the same time, and under the same circumstances alleged in the former case; but in this latter case a defence was also set up, that the deceased was travelling on the railway gratuitously, or else that he was wrongfully travelling on the terms of a free pass ticket, which, though expired, he used for the purpose of avoiding payment of railway fare, and by the terms of which he took upon himself all risks of accident. The cause was tried at Hamilton on the 31st October, 1860, before Sir J. B. Robinson, C. J., of Upper Canada. It was admitted that the deceased, Alexander Braid, was in the train from London (in Canada) to Hamilton, that he was in the sleeping car, and was killed by the accident which happened on the morning of the 19th March, 1859, about two o'clock, A.M. It appeared by the evidence that the deceased had been a railway officer in the employ of the Appellants, and had had a free pass in each of the years 1856, 1857, and 1858, and had improperly retained in his possession the two passes for 1857 and 1858, and that in 1859, after he left the service of the Appellants, he had claimed of the conductors and servants on the line a right to travel free, presenting one of his old passes, and on some occasions, had been allowed to do so, and on others (as many as two) he had paid; and on one occasion had told one of the conductors (not the conductor on the night of the accident) that he was the only conductor who made him pay. The two pass tickets for 1857 and 1858 were found on him after his

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death. The conductor, on the journey in question, supposed that he had a free pass, and when examining the tickets of others sitting near Braid, was told in his presence that Braid had a free pass ticket; and Braid was not asked for his ticket. No evidence was given of any other ticket than the two free pass tickets being found on him. Nor was any other evidence of his having paid his fare given. It was proved that persons travelling with free pass tickets take upon themselves all risk of accidents and damages. The judge summed up the case to the jury. The jury found a verdict for the Respondent, with damages 4000 dollars; and being asked at the suggestion of the Appellants' counsel stated that they concluded that the deceased had paid his fare on the 18th, as it had been proved he did on two other occasions recently before, and that he was not travelling under a free ticket. In the following term (Michaelmas 1859), the counsel for the Appellants obtained a rule nisi in the Court of Common Pleas of Upper Canada for a new trial, on the ground of mis-direction and want of direction, and on the ground that the verdict was against law and evidence. In the following term (Hilary 1860), cause was shown against the rule, and it was discharged; but the Chief Justice of the said Court of Common Pleas was of opinion that the verdict was against the weight of evidence, and his lordship differed from the other two judges in that respect. Judgment was on the 20th March, 1860, entered for the damages and costs, being 4240 dollars 68 cents. Against that judgment the then Defendants appealed to the Court of Error and Appeal for Upper Canada. The appeal came on to be heard before the said Court of Error and Appeal on the 27th December, 1860, and on the 23rd January, 1861, judgment was delivered, to the effect that the Court was of opinion that the directions to the jury were proper; that the verdict was supported by evidence, and that the majority of the Court were of opinion that the judgment was not against the weight of evidence. The judgment appealed from was therefore affirmed. The Appellants having obtained leave from the said Court of Error and Appeal to appeal to Her Majesty in her Privy Council, and having complied with the terms on which the appeal was allowed, now appealed accordingly.

Manisty, Q. C., and *Kew*, for the Appellants, in both cases, contended that there was no evidence of negligence, or want of care or skill in the construction of the railway, or in repairing or maintaining the same, which occasioned the accident; that the judge mis-directed the jury in telling them there was evidence of culpable negligence in the construction or maintenance of the embankment which, it could be said without doubt, occasioned the accident; that it was at least as consistent with the evidence, that the giving way of the embankment arose from inevitable accident, or a cause which the Appellants could not reasonably anticipate or guard against as from any negligence or want of care or skill in the construction or maintenance of the embankment; that the judge ought to have given the jury some instruction or direction as to what constituted culpable negligence in the construction and maintenance of the embankment, and to have explained to them under what circumstance and in what manner the Appellants would be liable for the consequences of the storm.

Matthews, for the Respondent in both cases :—There was no mis-direction on the part of the judge. The question whether the verdict was against the weight of the evidence is not now in issue. The jury were justified, on the evidence, in finding a verdict for the Respondents.

The following authorities were referred to :—

Withers vs. The North Kent Railway Company (27 L. J., Ex., 417); *Bligh vs. The Birmingham Waterworks Company* (11 Exch. 781); *Toomey vs. The London, Brighton and South-coast Railway Company* (3 O. B., N. S., 146); *Carpue vs. The London, Brighton, and South-coast Railway Company* (5 Q. B., 747); *Skinner vs. The London, Brighton, and South-coast Railway Company* (5 Exch. 787); *Ruck vs. Williams* (27 L. J., Ex. 357); *Smith vs. Shepherd* (Abb. Ship. 382); *Ford vs. Lacey* (30 L. J., Ex. 351); *Bird vs. The Great Northern Railway Company* (28 L. J. Ex. 3); and the Acts and Ordinances of Lower Canada 22 Vict., ch. 13, sect. 57.

Lord Chelmsford delivered the judgment of their Lordships :—These cases come before us by appeals from judgments of the Court of Error and Appeal of Upper Canada, affirming judgments of the Court of Common Pleas in two actions brought against the Great Western Railway Company of Canada. As the action arose out of the same accident, and in each of them the same ground of negligence is alleged against the Company, the principal questions to be determined are the same in both. There are two points, however, which are peculiar to *Braid's case*, to which it may be necessary shortly to advert. The first of these, which was properly abandoned on the argument arose on two pleas of the Company, which alleged in substance, that Alexander Braid, the deceased, was travelling upon the Railway under circumstances which released the company from all liability to answer for his death; and it was admitted that if the onus of the proof of their pleas rested upon the Company, (of which there could be no doubt,) it would be hopeless to attempt to disturb the verdict of the jury upon these issues. The other is an objection which has been urged against the right of appeal, on the ground of the damages being of insufficient amount. This objection depends upon an Act of the Canadian Legislature (22 Vict., ch. 13, sect. 57), which enacts, "that the judgment of the Court of Error and Appeal shall be final where the matter or controversy does not exceed the sum or value of 4000 dollars." The damages in *Braid's case* were exactly of this amount; but it was contended, on behalf of the Appellants, that the costs which were the consequence of the verdict ought to be added to the damages, and that thus the matter in controversy would exceed the limited sum or value. As the judgment of their Lordships will be in favor of the Respondents upon the other grounds of appeal, they think it unnecessary to express any opinion upon this objection; but nothing which was thrown out by them in the course of the argument must be considered as any indication of their assent to the proposition that in estimating the matter in controversy the costs incurred by the losing party may be taken into account.

Having adverted to the questions which are applicable only to one of these appeals, we now proceed to those which are common to both. The actions were for damage alleged to have been sustained by the Plaintiffs in consequence of the deaths respectively of Thomas Fawcett and Alexander Braid, occasioned by the want of care and skill of the Company in constructing their railway,

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and in repairing and maintaining the same. The part of the railway where the accident occurred was carried over an embankment made on the slope of a mountain, and had been in use for four or five years without any injury having happened. Early on the morning of the 19th March, 1859, after an unusually heavy fall of rain, the embankment gave way to the extent of forty-five yards in length on the line of the track. Trains had gone over the place where the accident occurred during the preceding night, and a train with thirteen cars had passed the same spot at ten minutes past one on the morning of the 19th March. The train in question arrived at the part of the embankment which had given way about 2 A.M., and was immediately precipitated into the breach, the deaths of the two persons upon which the actions were brought being the unhappy consequence of this accident. In support of the verdicts which in both the actions were against the Company, it was insisted by the learned counsel for the Respondents that the mere proof of the embankment having given way would have been quite sufficient to establish a case of negligence, and in support of this position he cited the cases of *Carpue vs. The London and Brighton Railway Company* (5 Q. B. 747), and *Skinner vs. The London, Brighton, and South-coast Railway Company* (5 Exch. 787).

There can be no doubt that where an injury is alleged to have arisen from the improper construction of a railway, the fact of its having given away will amount to *prima facie* evidence of its insufficiency; and this evidence may become conclusive from the absence of any proof on the part of the company to rebut it.

However, the Plaintiffs did not rest their case solely on the fact of the falling in of the embankment, but called witnesses to give their opinion as to the cause of the injury. It was objected by the learned counsel for the Appellants that this evidence amounted only to theory and conjecture, and that the jury ought not have been permitted to act upon it. To this it may be answered that although the circumstances which occasioned the accident were facts to be proved, yet the causes which produced this state of circumstances were necessarily matters of opinion and judgment. But then it was said that the witnesses ascribed the accident to different causes, that their theories were conflicting and mutually destructive, and that consequently at the close of the plaintiffs' case there was nothing to go to a jury. The difference of opinion of the witnesses, however, refers merely to the mode in which the water must have operated upon the embankment, but they speak almost with one voice, as to the defective character of the drainage. It was assumed that at the close of the plaintiffs' evidence in each case there was an application by the defendants for a non-suit; but this seems to be a misapprehension. The notes of the learned judge who tried the cause appear to be merely the heads of the defence set up. The first ground of defence in both cases, that the company had always skilful engineers and could not therefore be held to have been negligent even if the work were not judiciously constructed, would have been prematurely urged as matter of non-suit at that stage of the trial, as no proof had then been given of the employment of such engineers by the company. The language of the note in Braid's case "it being proved" must be understood upon its being proved, and must be taken as a short mode of stating the intended defence.

The other defence mentioned to have been raised in Braid's case only was clearly for the jury, even if the unusual state of the weather had been proved in the course of the Plaintiff's case.

Although no mention is made of this ground of defence in the notes in Fawcett's case it is fair to assume that it was urged on behalf of the company in that case also, not only from the nature of the evidence but also from the circumstance, that when, on the application for the new trial, misdirection was imputed to the learned judge in this particular, it was never objected that no question of the kind had been raised. The defence in both cases, therefore, was substantially the same, being founded upon proof of the proper construction of the railway, of the daily inspection of the line, and of the violence of the storm of rain, which carried away the embankment. As far as we can collect from the learned judge's note of his charge to the jury, he does not appear in Fawcett's case to have adverted to the company's defence arising upon the extraordinary and unforeseen state of the weather immediately before the accident; nor, in Braid's case to have mentioned it otherwise than in an incidental manner.

In neither case does he appear to have explained to the jury, the effect which would be produced upon the question of negligence, by satisfactory proof that the storm which destroyed the embankment was of such an extraordinary description that no experience would have anticipated its occurrence. Their Lordships think that the jury ought to have had their minds distinctly and pointedly directed to this question, and that without some definite instruction upon the subject, they were likely to have omitted it from their consideration. If, therefore, there had been any miscarriage on the part of the jury in consequence of this non-direction, and a verdict against the evidence had been produced by it, their Lordships would have felt themselves compelled to send the case to a new trial. But upon a careful examination of the evidence, they have come to the conclusion that the verdict ought to have been the same, even if the question of negligence had been left to the jury, accompanied with a direction as to the circumstances under which the company would have been exonerated from liability. In the construction of works of a permanent character, such as a railway, the amount of precaution which ought to be taken to guard against any external violence to which it may be exposed cannot be the subject of any precise rule, but must necessarily vary according to the varying local circumstances of each case. The difficulty of extracting any principle from decided cases which may be applied with certainty to question of this description, is strongly exemplified by two judgments of the Court of Exchequer, which were delivered within three weeks of each other. In *Withers vs. The North Kent Railway Company*, (27 L. J. Ex. 417), which was an action against the Railway company for an injury occasioned by their keeping and maintaining their railway in an insecure state, it appeared that the railway had been constructed five years, and ran through a marshy country subject to floods; that it was constructed on a low embankment composed of a sandy sort of soil likely to be washed away by water; and that the culverts were insufficient to carry off the water. Evidence was given that on the day of the accident an extraordinary

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storm occurred, accompanied for sixteen hours with very violent rain, and that in consequence of this, a stream near to the spot at which the accident had occurred had been swollen to a torrent, and washed away a bridge, and poured down with great force upon the line; that the water had by midnight worn the earth away under the sleepers on some places leaving the rails unsupported and exposed.

A verdict was given for the plaintiff, but the Court set it aside, and granted a new trial; Pollock, C. B., saying that the company was not bound to have a line constructed so as to meet such extraordinary floods; Bramwell, B., observing that "the very existence of the line for five years, notwithstanding that the district was subject to floods, tended to negative the only negligence which was set up."

There is some difficulty in reconciling this remark with the language used by the same learned judge in the other case of *Ruck vs. Williams* (27 L. G., Ex., 857). That was an action against commissioners of sewers for negligence in constructing a sewer in a defective and improper manner and keeping it in that state, whereby it burst and damaged the plaintiff's premises. It appeared that the sewer, was constructed in April, 1853. In the year 1855, two severe storms occurred, one on the 14th July, which occasioned the bursting of the sewer and another on the 26th July, before the repair of the sewer was completed, at which time the injury was done to the plaintiff. It was stated in the report of the commissioners' surveyor, that the storm of the 26th July was without precedent for its violence. The Court held that the plaintiff was entitled to recover.

Bramwell, B., in answer to the argument for the defense of the commissioners arising out of the extraordinary violence of the storm which occasioned the damage, said, "he called it an extraordinary but in truth it is not an extraordinary storm which happens once in a century or in fifty or twenty years; on the contrary, it would be extraordinary if it did not happen;" and he added "therefore, it seems to me that the commissioners who ought to have put down a flap of a permanent character in order to guard against a thing likely to occur, not only in a short time, but at all times, may well be said to be guilty of negligence relatively to the probable event of a storm happening in fifty years." Their Lordships, without attempting to lay down any general rule upon the subject, which would probably be found to be impracticable, think it sufficient for the purpose of a judgment in these cases, to say that the Railway company ought to have constructed their works in such a manner as to be capable of resisting all the violence of the weather which in the climate of Canada might be expected, though perhaps, rarely, to occur. Now, the evidence, fairly considered, shows nothing beyond this in the character and degree of the storm which destroyed the embankment.

The night of the accident is described by various witnesses to have been "very severe." One says it was a "bad night, very bad;" another, in the usual style of exaggeration, that "it was the worst night he ever saw;" it is stated by others that the rain "washed away bridges and portions of the road;" and two of the Plaintiff's witnesses described the storm, one as being "a very unusual one," the other an "extraordinary storm." In the whole of this evidence there is

nothing more proved than that the night was one of unusual severity, but there is no proof that nothing similar had been experienced before, nor is there any thing to lead to the conclusion that it was at all improbable that such a storm might at any time occur. It must also be borne in mind, that although the embankment had stood firm for five years, and had possibly not been exposed to any storm of equal violence to that before which it gave way, yet it was evidently not constructed, or at least not maintained in a manner to enable it to resist any unusual pressure. It appears that there was a ditch made for the purpose of carrying off the water that came down from the hill, but it was either imperfectly constructed from the first, and of insufficient dimensions, or it was suffered to be obstructed and choked up, so that when an unusual quantity flowed into it, it was unequal to the occasion.

The company's engineer says in his report, "It appears from the levels that there is a depression of two feet in one place. The ditch is an imperfect one. If that depression of two feet had been filled in, I question whether that accident would have occurred." And afterwards, "The cause of this accident can be overcome, and must be, to prevent the recurrence of such an accident again. It is true that he adds, "no engineer could possibly have foreseen such an accident as this." But whether he means that it was impossible to have anticipated such a storm as occurred, or that from the manner in which the embankment was constructed, it could not have been expected to give way, it is not easy to determine. Whatever his meaning may be, it is evident that the embankment was insufficiently provided with means of resisting the storm, which, though of unusual violence, was not of such character as might not reasonably have been anticipated, and which, therefore, ought to have been provided against by all reasonable and prudent precautions. Even supposing, then, that the learned judge omitted to explain to the jury what amount of *vis major* would exonerate the company from the charge of negligence, yet their Lordships are of opinion that had their direction been given, and had the jury been led by it to find for the company, their verdict would have been wrong; they adopt the language of the Court of the Exchequer in *Ford vs. Lacey* (30 L. J., Ex., 351), that non-direction is only a ground for granting a new trial where it produces a verdict against the evidence;" and they will, therefore humbly recommend to Her Majesty that the judgment in these cases be confirmed, with costs.

(W.B.B.)

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and
Jane Fawcett
and
Margaret
McKay Brad

Joseph Boswell,
and
C. A. Kilborn
et al.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, LOWER CANADA.
15TH JUNE, 1860.

Present:—LORD JUSTICE KNIGHT BRUCE, SIR EDWARD RYAN, LORD JUSTICE
TURNER AND SIR JOHN TAYLOR COLERIDGE.

JOSEPH BOSWELL,

Defendant in the Court below,

AND

APPELLANT.

CHARLES ALEXANDER KILBORN ET AL.,

Plaintiffs in the Court below,

RESPONDENTS.

A sum was ordered to be deposited for security of Respondents' costs on allowance of an appeal granted *ex parte*; upon petition of the Respondents the deposit was increased, on account of the length of the transcript of the proceedings in the Court below.

In this appeal an Order in Council was made upon an *ex parte* application granting leave to appeal upon terms of lodging in the Registry of the Privy Council the sum of £100, sterling, as security for the costs of the Respondents, in case the appeal should be dismissed. (See case reported on this point, 12 Moore's P. C. Cases 467).

A petition was now presented by the Respondents for further security for costs.

In the petition it was alleged, that the sum of £100, was insufficient, in consequence of the great length of the transcript of the proceedings, and that a further sum of £200, was necessary to be lodged as security for the Respondents' costs, over and above the sum of £100, already deposited. This petition was supported by an affidavit of the Respondents' Solicitors verifying that averment.

Their Lordships ordered (with the consent of the parties), that the further sum of £100 should forthwith be deposited in the Registry of the Privy Council by the Appellant, as security, for the costs of the Respondents, subject to the same conditions as the sum of £100, deposited in pursuance of the former Order in Council.
(W. N. B.)

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, LOWER CANADA,
18TH JULY, 1860.

Present:—LORD KINGSDOWN, LORD CHILMSFORD, AND SIR EDWARD RYAN,
The Quebec Fire Assurance Company,
and
Horatio Smith Anderson, et al.,

APPELLANTS,

RESPONDENTS.

Held:—1st. An order was granted permitting an appeal upon *ex parte* application founded upon an allegation that the interest added to the principal sum recovered in action on a fire policy, exceeded the sum of £600 sterling, (the appealable value prescribed by the Lower Canada Act, 34, Geo. III., c. 6., sec. 30.)

2nd. The permission to appeal was granted upon depositing in the Registry of the Privy Council the sum of £200 as security for the costs.

The facts were, in substance, these:—

An action was brought by the Respondents in the year 1857, in the Superior Court at Quebec, against the Appellants, upon a fire policy, to recover the sum of £500 current money of Lower Canada, with legal interest and costs.

The action was tried before a jury, who found for the Appellants, and, upon a motion for a new trial, the Superior Court sustained the verdict of the jury and

dismissed the action. An appeal was brought from this judgment to the Court of Queen's Bench for Lower Canada, which Court on the 20th June, 1860, reversed the judgment of the Superior Court, and decreed the Appellants to pay the Respondents the sum of £500 currency with interest from the 1st of September, 1859 and costs. An application was then made to the Court of Queen's Bench in Canada for leave to appeal to England, but as the matter in dispute was under £500 sterling, that Court refused to allow the appeal.

A petition was thereupon presented by the Appellants to Her Majesty in Council, in which it was alleged, that at the time the judgment of the Court of Queen's Bench was rendered, the demand before that Court was for £500 currency, with interest at the rate of 6 per cent, the legal interest provided by the Canadian act 22 Vict. from the 15th June, 1857, which made up together the sum of £590 currency, which with the costs in both Courts in the colony amounted to the sum of £635 currency, which exceeded £500 sterling, the sum prescribed by the Lower Canada Act 34. Geo. III. c. 6. sec. 50. That, by the Lower Canada Act 12 Vict. sec. 82, the right of appeal depended upon the amount demanded and not the amount recovered.

That as the questions of Law involved in the judgment were of great importance and of general application in the law of insurance, it was desirable to have the opinion of the highest Court of Appeal, and the petitioner, therefore prayed for special leave to appeal. The petition was supported by an affidavit of the Appellants' agent in England, in which it was stated that the sum of £608 6 s currency was equal to £500 sterling.

The application was made *ex parte*.

Mr. C. Pollock in support of the petition, cited *Boswell vs. Kilborn*, (12 Moore's P. C. Cases, p. 467), and *Castrique vs. Buttigieg*, (10 Moore's P. C. Cases p. 94).

The Right Hon. Lord Chelmsford:—Their Lordships upon the facts stated in the petition will grant leave to appeal, security being given for £200.

By an Order in Council dated the 1st August, 1860, it was ordered that the *Quebec Fire Assurance Company* should be allowed to enter and prosecute the appeal from the judgment of the Court of Queen's Bench of the 20th June, 1860, upon depositing in the Registry of the Privy Council the sum of £200 as security for the costs of the Respondents in case the same should be dismissed. (W. E. B.)

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, LOWER CANADA,
14th JUNE, 1861.

Present:—LORD KINGSDOWN, SIR EDWARD RYAN, LORD JUSTICE KNIGHT
BRUCE, AND LORD JUSTICE TURNER.

The Quebec Fire Assurance Company,

AND

Horatio Smith Anderson, et al.,

APPELLANTS,

RESPONDENTS.

The order granting leave to appeal, reported in the preceding case, was discharged upon the petition of the respondents, showing that the calculation as to value was erroneous.

A petition was presented by the respondents to discharge the order granted by the Privy Council on the 18th July, 1860, and reported on page 150.

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The petition set forth that by the 30th Section of the Act of *Lower Canada*, 34th Geo. III, c. 6, it was enacted, that the judgment of the Court of Appeals of the Province should be final in all cases where the matter in dispute should not exceed the sum or value of £500 sterling; and that by the same section, it was provided, that security should be first duly given by the appellant that he would effectually prosecute his appeal, in case the judgment of the Court of Appeals be affirmed or provided that the appellant agreed and declared in writing at the Clerk's office of the Court appealed from, that he did not object to the judgment given against him being carried into effect according to law, on which condition he was to give securities for the costs of appeal, only in case that the appeal was dismissed, and on condition also that the appellee should not be obliged to render and return to the appellant more than the net proceeds of the execution with legal interest on the sum recovered, or the restitution of the real property and of the net value of the produce and revenues of the real property, whereof the appellee had been put in possession by virtue of the execution, to take place from the day he recovered the sum or possessed the real property until perfect restitution was made, without any damage against the appellee by reason of such execution, in case that the judgment be reversed, any law, usage, or custom to the contrary notwithstanding. That the appellants had not served the order in Council of the 1st August, 1860, allowing them to enter and prosecute the appeal, or given security in Canada to answer the condemnation, or agreed and declared in writing at the Clerk's office of the Court appealed from, that they do not object to the judgment given against them being carried into effect, according to ~~to~~, as the respondents submitted ought to have been done, according to the provisions of the above act. That the matter in dispute, and for which the action was brought was for the sum of £500 currency, and that such sum was a complete and entire demand, and that the judgment of the Court of Queen's Bench was for £500 currency, and interest thereon from the 1st of September, 1859, and not from the 15th of June, 1857, as alleged by the appellants in their petition for leave to appeal; that where the debt or original claim would not carry interest from the time the demand arose, it would depend upon the length of litigation whether the interests and costs given by a judgment of the Court was to be added to the principal to raise the amount above the sum of £500 sterling. That a pound sterling was fixed by statute at *par*, at £1 4s. 4d. Canadian currency; and £500 sterling would be equal to £608 6s. 8d. of such currency. And the respondent submitted, that the matter in dispute in the appeal did not amount to £500, sterling; that the point submitted to the jury involved mere questions of fact, and did not raise any question of general principle affecting insurances as alleged in the petition for leave to appeal, and did not come within the scope of the 30th section of the *Lower Canada* act, the 34th Geo. III, c. 6, sec. 30: and the respondent prayed, that the order in Council of the 1st of August, 1860, might be discharged, or in case Her Majesty should be pleased to continue the appellants leave to enter and prosecute the appeal, that the appellants might be required before prosecuting the same to give security to answer the condemnation as provided by the 30th section of the *Lower Canada* act, 34 Geo. III., c. 6.

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The facts stated in the petition were verified in the affidavits.

Mr. *Bwill*, Q. C.; and Mr. *W. Field*, for the respondents, in support of the petition.

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and
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The 30th section of the act of Lower Canada, 34 Geo. III., c. 6, contemplates and contains provisions for two classes of cases, first, where the amount is above £500 sterling; and secondly, for certain special cases therein provided where the value in dispute may be below that sum. Now, the allegation in the petition of the appellants for leave to appeal, is founded upon an entire misconception of the true value of the subject at issue. The demand in the action before the Superior Court was for the sum of £500 currency, only, and which was not one bearing interest by contract. In truth by the judgment of the Court of Queen's Bench, the respondents only recovered interest as from the 1st of September, 1859, the date of the judgment of the Superior Court; and the principal including interest and costs from that date until execution, only amounted to the sum of £590 9s. 7d., currency, an amount below the appealable value, which must exceed the sum of £500 sterling. Even if the interest and costs added to the principal made the value exceed £500 sterling, we contend, that according to the practice of the Courts in Lower Canada, and the true construction of the act, 34th Geo. III., c. 6, sec. 34, interests and costs could not be included, being consequential and incidental to the sum claimed by the declaration.

Boswell vs. Kilborn (12 Moore's P. C. cases, 467) will probably be relied upon by the other side.

That case, however, was an *Ex parte* application, and there were important questions of law, as well as the fact that other actions were depending, involving the same questions, which induced the Court to grant the indulgence asked for.

There is nothing of the kind here.

Mr. *Lush*, Q. C., and Mr. *C. Pollock*, for the appellant resisted the application.

Neither the act of Lower Canada 34 Geo. III., c. 6 sec. 30, or any local legislative act, can deprive the crown of the prerogative of granting leave to appeal, *Cuvillier vs. Aylton* (2 Knapp's P. C. cases 72); statute, 31st Geo. III., c. 31, sec. 2; that power has been delegated to the judicial committee by statute, 3rd and 4th Will. IV. c. 41, which statute reserves the right of the Crown to admit an appeal irrespective of any local acts of a Colonial legislature restricting the same. *Boswell vs. Kilborn*, (12 Moore's P. C. cases, 467) is a case upon this subject. It is true that the principal sum recovered with interest and costs may not exceed the sum of £500 sterling, yet as the leave to appeal was given in virtue of the prerogative of the Crown, the fact of the amount in dispute is wholly immaterial.

Lord Kingsdown; The order in Council granting leave to appeal must be discharged, as their Lordships are of opinion that the sum does not exceed £500, sterling, the amount required by the Lower Canada act 34th Geo. III., c. 6, sec. 30, as the appealable value to the Queen in Council.

We think moreover that there is no general principle involved in the case which can bring it within the scope of the latter part of that section.

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A party applying *ex parte* and obtaining an order such as has been obtained in this case, takes it subject to the other side applying to discharge it. Now, as it has been shown to us that the sum involved does not amount to £500 sterling, and there is not any particular question of law at issue which would entitle the appellants to indulgence, the order in Council allowing the appeal must be discharged; but, in the circumstances, without costs.
(W. E. B.)

IN THE COURT OF COMMON PLEAS FOR UPPER CANADA.

Fisher vs. Jamesson.

Held :—1st That the dower according to the law of Upper Canada of a woman domiciled in Lower Canada in lands which belonged to her husband, but which were situate in Upper Canada, is not barred by the stipulation in an antenuptial contract executed in Lower Canada, whereby "*dowre coutumier or prefe,*" was renounced to.

2nd That the marriage contract referred to the Law of Lower Canada, and was intended to operate on Real property and on the rights of dower recognized and governed by that Law.
(M. T., 26 Vie.)

DOWER, claiming as widow of John Fisher, deceased.

Pleas.—1. On equitable grounds. That before demandant's marriage to John Fisher, *i. e.*, on the 26th of October, 1821, a marriage contract was entered into at Quebec between the said John Fisher and demandant, which is a good and valid marriage contract and settlement according to the laws of Lower Canada, whereby it was agreed that the goods and chattels, lands and tenements, which each then had or thereafter should acquire during marriage, should be the property of the one by whom they were so acquired. And in case demandant survived John Fisher, she should not be entitled to dower in the lands of John Fisher, or of those of which he should be seised during the marriage; and demandant did thereby renounce all claim thereto for the future. And John Fisher agreed, that in the event of demandant surviving him, she should take by title paramount, beyond what should belong to herself, all such effects, clothes and linen which should then be there found, with her watches, rings and jewellery; and that he should give her £300 in cash, and £100 per annum, payable half-yearly, with which payment John Fisher charged his lands, tenements, goods and chattels. That John Fisher and demandant were duly married, and John Fisher, after the marriage, during his life-time, bargained and sold the tenements in the plaint mentioned to the Commercial Bank, and afterwards died. That demandant, after the death of John Fisher, took and received the goods and chattels, land, and tenements, which by the marriage contract were agreed to be her proper goods, &c., and after the death of John Fisher, took and received the £100 annually of the moneys of the said John Fisher, in the hands of his personal representatives, year by year, from the day of the death of John Fisher, hitherto, and the said sum of £300, and the clothes, linen, watches, &c.; and that the contract and acceptance are a sufficient jointure and release of dower, and that demandant elected to take the same in lieu of dower.

2. On equitable grounds. That John Fisher, after his marriage with demandant, was seised of the lands in the plaint mentioned, and during his life-time sold the same, by deed of bargain and sale by way of mortgage, to the Com-

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mercantile Bank for £1361 7s. 7d., with covenant for quiet enjoyment, without the let, suit, or incumbrance of the said John Fisher, or any one claiming under him. That the tenant is seised in fee simple of the premises, and derives his title by deed from the Commercial Bank, made after John Fisher had conveyed to them. That John Fisher died, having first made his will duly executed, and thereby devised to demandant all the revenue to be derived from his estate in full of all benefit to be derived from his estate, not exceeding £500 per annum; that demandant, after the death of John Fisher, received the £500 annually, from the death of John Fisher, hitherto, and that demandant claims title to dower through John Fisher, and not otherwise, and thereby hath elected to take the same in lieu of dower.

Demandant takes issue on the first plea, and replies that at the execution of the marriage contract, and at the marriage of the demandant to John Fisher, she was an infant under the age of twenty-one years; that by the contract no good and sufficient jointure binding on the demandant, being an infant, was provided, and that she has never, since the death of John Fisher, accepted of any of the provisions made by the contract for her, nor hath she elected to take any provision thereby made in lieu of dower. On this the tenant takes issue.

Demandant takes issue on the second plea.

The demandant was called as a witness for the defence. She proved her marriage at Quebec, on the 27th of October, 1821, the day after the execution of the marriage contract. She was born on the 16th of January, 1802. John Fisher died on the 16th of January, 1858, in Montreal; he left a will. At the time of the marriage, John Fisher had no lands or houses. He bought the farm mentioned in his will after the marriage, and sold it during his life-time. He also bought a house in St. Antoine street, Montreal, in which he and demandant lived together, and which demandant has occupied since his death. At the time of his death, John Fisher left no property, except the house in Montreal, and the furniture therein. The demandant has not received the sum of £800, nor the annuity of £100 since his death, nor any other part of her deceased husband's property. An inventory was taken of the effects in the house, and they remain there still. John Fisher died in embarrassed circumstances. The widow continued to live in the same house making use of the furniture. It was proved that by the law of Lower Canada the marriage contract was binding on the demandant, though she was a minor when she executed it, as her parents were parties to it, and the contract would give her the first claim for the amount settled on her, and the house and farm would be subject to this claim. The marriage contract operates as a mortgage, if registered, and therefore, if this contract was, as was assumed, registered, it bound the farm, unless demandant released it. Whether she had or not did not appear.

The question for the Court is whether on these pleadings and facts the defence is established.

Jellet, for plaintiff, referred to *Carruthers vs. Carruthers*, 4 Brown Chy. Rep. 500; *Neve vs. Hollands*, 16 Jur. 933; *Dyke vs. Randell*, 2 DeGex McN. & G. 209; *Tinney vs. Tinney*, 3 Atk. 8; *Foster vs. Cook*, 3 Brown Chy. 847.

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C. S. Patterson, for the defendant, cited *Drury vs. Drury*, 3 Brown, Par. Ca. 497; *Boynston vs. Boynston*, 1 Brown Ch. R. 445; *Barrow vs. Barrow*, 4 Jur. N. S. 1049.

JUDGES. C. J.—The first plea presents the question whether the marriage contract was binding on the demandant, as she was an infant when it was entered into. If the answer were to be given according to the law of England, there would be no doubt. Cockburn, C.J., says, "I take it to be quite clear that neither at law nor in equity can an infant enter into a contract," excepting for necessities, &c., *Bartlett vs. Wells*, 8 Jur. N. S. 762.

A general rule of law is stated by Lord Eldon, in *Male vs. Roberts*, 3 Esp. N. P. Ca. 163, that the law of the place where the contract is made must govern the contract. And the present case is so far stronger than *Male vs. Roberts*, that here, all the parties to the contract were resident in Lower Canada when the contract was made. According to the evidence given, this marriage contract is valid and binding by the law of that part of the province on the demandant, though she was a minor when it was entered into. Assuming the law to be as thus proved, then according to what was said by the Master of the Rolls, in *Carruthers vs. Carruthers*, 4 Bro. Ch. C. 512, that an adult female "may take a provision out of the personal estate, or even a chance," in satisfaction of dower, acting with her eyes open; the demandant must be deemed as bound by this contract, whatever may be its legal construction and effect.

No question can arise, under the circumstances, as to the jointure. One consideration for the demandant's agreement to renounce dower would seem to have been the husband's contract, that she should be paid a gross sum of £300, and an annuity of £100, both depending on her surviving him. But the consideration for the husband's contract is stated to be the agreement previously set forth that there should be no community of goods between them, while the renunciation of dower is not stated to form any part of the consideration for the contract to pay demandant these sums of money. The evidence, however, shows, that according to the law of Lower Canada, this charge would attach upon the after acquired real estate of the husband, and therefore, upon the farm and house in Montreal, and there seems to be no reason to doubt but that the renunciation of dower was, according to the law of Lower Canada, valid and effectual.

At the time of the marriage, and for some time after, the demandant could have had no inchoate right of dower, for her husband had no real estate. Still the contract, that there should be no community of goods, took effect, and by it the husband was debarred from acquiring any right to or power over the demandant's after acquired property. There can be nothing inequitable in the contract, that on her part she should have no right to dower.

The question I have hesitated upon, is what effect we should give to the words of the contract, "Il n'y aura aucun douaire coutumier ou préfix ou conventionnel, chacun des dits John Fisher et Margaret Hunter futures époux renonçant par ces dites présentes au dites douaires et à chacun d'eux." It has been argued that the word "coutumier" (which has been translated "customary") cannot be considered applicable to the right of dower existing under our law, and

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that neither the word "préfix" (which is not translated) nor the word "conventionnel" (which is translated "stipulated") are more applicable; that the renunciation is of these specific kinds of dower only, whatever they may be and, does not amount to a general renunciation of all and every kind of dower. The maxim *expressio unius, &c.*, is invoked in aid of this argument.

The popular meaning of "coutumier" is probably as different from its legal signification as the legal and popular meaning of the word customary is with us. If a word of art, it is not expounded by the evidence, nor is it stated whether it is used as a word of art or in a popular signification. It would be, I presume, clearly wrong to apply any technical interpretation which we might give to the word "customary," to the French word *coutumier*.

In the absence of such evidence, I think we should view the contract as referring to the law of Lower Canada, and intended to operate on real property, and on the rights of dower recognized and governed by that law, a conclusion which I feel fortified by the consideration, that according to that law the money covenanted to be paid to the widow forms a charge or lien on the real estate of the husband situate in that part of the province.

I therefore conclude that the plea itself, if all proved, would not afford an answer to the demandant's claims for dower out of land in Upper Canada, and the latter part of the plea is actually disproved. The defence is pleaded on equitable grounds, but unless a different construction than the one I have adopted be given to the contract, the defence would no more be available in equity than at law.

The second plea is certainly disproved.

In my opinion the *postea* should be delivered to the demandant.

RICHARDS, J.—I concur in the construction placed on the marriage contract, and that by its terms it does not deprive the demandant of her dower in lands situate in Upper Canada, even if it were held to be binding and in force here.

Considering the way in which the instrument was executed, and the fact that the demandant was a minor at the time of its execution, as well as the effect it might have by the law of Lower Canada to bind the after acquired property of the intended husband, if duly registered there, I am not prepared to decide that such a contract can be considered as binding so far as relates to real property situate in Upper Canada, whatever may be its effect on personal property in this part of the province.

* *Per Curiam*.—Judgment for demandant.

(A.M.)

* The foregoing report bearing upon an interesting question of Interprovincial Law is extracted with the exception of the holdings from the Upper Canada Law Journal for June.—Reporter's Note.

COUR DU BANC DE LA REINE.

EN APPEL DE LA COUR SUPERIEURE, DISTRICT DE MONTREAL.
MONTREAL, 1^{er} JUIN, 1863.

Coram, AYLWIN, J., MEREDITH, J., MONDELET, J., BERTHELOT, J.

No. 27.

BOURASSA,

Demandeur en Cour Inférieure,

APPELANT,

ET

BEDARD,

Défendeur en Cour Inférieure,

INTIMÉE,

ET

BOURASSA, FILS, et al.,

Appellants par reprise d'instance,

ET

BEDARD, et vir,

Intimés par reprise d'instance.

Jugé:—Que par la loi du pays, le Donateur a le droit de prohiber au Donataire, du vivant du Donateur, l'aliénation des biens donnés sous peine de nullité et que telle prohibition comprend et embrasse l'aliénation par acte de dernières volontés.

Cet appel avait été interjeté du jugement rendu par la Cour Supérieure à Montréal, le 30 Avril, 1858 et rapporté à la page 48 et seq. du 3 Vol. de la Collection de décisions du Bas-Canada. L. C. J. (*)

Le jugement de la Cour Supérieure a été infirmé et le jugement de la Cour d'appel est motivé comme suit:—

La Cour après avoir entendu les parties par leurs Avocats, sur le mérite, examiné le dossier de la procédure en Cour de première instance, les Griefs d'Appel et les Réponses à ceux et sur le tout mûrement délibéré :

Considérant que par la loi du pays le donateur en un acte de donation entre-vifs a le droit de prohiber au donataire, du vivant du donateur, l'aliénation des biens donnés, et ce sous peine de nullité de tout acte d'aliénation à ce contraire, et que telle prohibition d'aliéner embrasse et comprend en pareils cas l'aliénation par acte de dernières volontés, qui est vis-à-vis et quant au donateur un acte d'aliénation entraînant tous les effets d'un acte d'aliénation entre vifs.

Considérant que dans l'espèce actuelle le dit Hubert Bourassa le donateur au contrat de mariage du vingt-deux octobre mil huit cent vingt-sept, reçu devant M^{re}. Barbeau et confrère, notaires, entre son fils François Bourassa et Florence Brosseau, avait le droit de défendre de son vivant, (ce à quoi il avait un juste intérêt) à son fils le donataire, l'aliénation des biens à lui donnés, à savoir, des trois immeubles y mentionnés et désignés comme suit en la déclaration en cette cause.

Considérant que par son testament du dix-neuf janvier mil huit cent cinquante six, reçu devant M^{re}. A. Beauvais, notaire, et deux témoins, le dit feu François Bourassa en instituant la dite Scholastique Bédard sa seconde femme, unique héritière et légataire universelle de tous ses biens, n'a pu aucunement

(*) Autorités des Intimés.—6 Toullier, p. 519, p. 521, No. 488.—Coin—Delisle, p. 287, 282, no. 22.—Journal des Aud. 27 Juin, 1711.—Digeste loi 28. s. 3. De Leg. 4.

transférer à cette dernière la propriété les biens ci-dessus désignés qui avaient fait l'objet de la donation que lui en avait faite le dit Hubert Bourrassa son père par et lors de son dit contrat de mariage du vingt-deux octobre mil huit cent vingt-sept avec sa première femme la dite Florenee Brosseau, et que par conséquent la dite Scholastique Bédard ne pouvait pas invoquer le dit testament pour repousser l'action du dit Hubert Bourrassa en tant qu'elle avait pour objet de réclamer la propriété des dit trois immeubles, et que par conséquent il y a erreur dans le jugement de la Cour Supérieure du trente avril mil huit cent cinquante-huit dont il est appel à cette Cour par le présent appel, a cassé et annulé le dit jugement avec dépens.

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Et cette Cour procédant à rendre le jugement qui aurait dû être rendu par la dite Cour Supérieure sur la demande et action du dit Hubert Bourrassa et sur la contestation liée sur icelle par la dite Scholastique Bédard.

Considérant que bien que le testament du dit feu François Bourrassa n'a pu conférer à la dite Scholastique Bédard aucun droit de propriété quant aux dits trois immeubles ci-dessus désignés, a pu néanmoins et l'a de fait établi et nommé héritière et légataire universelle du dit feu François Bourrassa en tous les autres biens dont il pouvait légalement disposer, a débouté et déboute l'action du dit Hubert Bourrassa en tant qu'elle a rapport aux biens faisant partie de ce qui composait la communauté de biens qui avait existé entre le dit feu François Bourrassa et la dite Scholastique Bédard aux termes de leur contrat de mariage, ou à tous autres biens dont le dit feu François Bourrassa pouvait disposer, ou a disposé, autres que les trois immeubles ci-dessus désignés qu'il tenait du dit feu Hubert Bourrassa, son père, à titre de donation en vertu de son dit contrat de mariage du vingt-deux octobre mil huit cent vingt-sept, avec prohibition d'aliéner en manière quelconque.

Et la Cour adjugeant sur l'action en tant qu'elle peut avoir trait aux dits trois immeubles ci-dessus désignés, a déclaré et déclare que les dits Appelants par reprise d'instance en leurs qualités de représentants légaux du dit feu Hubert Bourrassa le demandeur, sont propriétaires des dites qualités des dits trois immeubles ainsi que le dit feu Hubert Bourrassa l'était lui-même à compter du jour du décès du dit feu Hubert Bourrassa et ont droit aux fruits et revenus d'iceux de puis le neuf juin mil huit cent cinquante-six jour du décès de ce dernier.

Et en conséquence ordonne, adjuge et condamne les dits Intimés par reprise d'instance et es dite qualité à livrer, rendre et remettre aux dits Appelants par reprise d'instance la jouissance et la possession des dits trois immeubles et ce sous quinze jours à compter de la signification du présent jugement, et en outre à ce qu'ils rendent sous trois mois à compter de ce jour un compte vrai, juste, fidèle et sous serment et accompagné de pièces justificatives et suivant la loi, des fruits et revenus des dits trois immeubles depuis le neuf juin mil huit cent cinquante-six jour du décès du dit feu François Bourrassa, et qu'à faute par les dits Intimés par reprise d'instance de se conformer à rendre le dit compte et au présent jugement qu'ils y soient contraints tel et ainsi qu'il pourra appartenir et suivant la loi, par et sous l'autorité de la Cour Supérieure en la manière ordinaire en pareil cas.

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MEREDITH, J., delivered the judgment of the Court as follows:—

The Appellant, by a deed bearing date the 22nd Oct. 1827, gave to his son, François Bourassa certain real estate; one of the conditions of the donation being as follows.—"Que lui le donataire, François Bourassa, ni ses hoirs, ne pourront, du vivant du donateur, et de celui de sa présente femme, ni du vivant du survivant d'eux, vendre, en aucune manière que ce soit, aliéner, le tout, ou partie des susdit lots de terre sans la permission par écrit, des donateurs ou du survivant d'eux: sans laquelle condition le donateur déclare qu'il n'aurait pas consenti les présentes, et qu'elle n'est pas comminatoire mais de rigueur."

François Bourassa, the Donee, by his last will and testament, bearing date the nineteenth day of January, 1856, left and bequeathed to his wife, the Respondent, the real estate so given to him conditionally by his father; and shortly afterwards died childless, and without having revoked his will. His widow, the Respondent, as his legatee, is now in possession of the property so given to her husband, which is claimed by the Appellant, the Donor, under the condition contained in the donation so made by him.

These facts bring two questions under our consideration, *first*—Is the prohibition *d'aliéner*, which was made a condition of the said donation, a valid condition? And if so, then, *2ndly*, Did the deceased violate that condition by disposing of the said property in favour of the Respondent, his wife? The learned counsel for the Respondent in the course of his argument observed that there are three different points of view in which a *défense d'aliéner* may be considered:

1st. When it is stipulated in favour of a third party indicated by the donation or will; in which case it creates a substitution, and is indubitably binding.

2ndly. When the *Défense d'aliéner* is accompanied by a penal clause; in which case the penalty can be enforced in the event of a violation of the *défense d'aliéner*.

3rdly. When the *défense d'aliéner* is *pure et simple et sans cause*, in which case it has no binding effect. As to the correctness of these views, I have no doubt; but at the same time I believe it to be equally clear that when a *défense d'aliéner*, in a donation, is stipulated for the protection of the rights of the donor, it is binding to all intents and purposes.

This doctrine was maintained by the Superior Court at Quebec in the case of Fafard vs. Bélanger (*) and still more recently by this Court in the case of Lynch and Hainault. (†)

In the case now before us the Donor was interested in several ways in preventing during his life time the alienation of the real estate given by him to his son. In the first place, so long as that property remained in the possession of the donee or his children, that is to say, in the possession of the children or grand children of the donor, it decreed in favour of the latter the payment of an alimentary allowance to him in the event of his requiring it.

(*) Fafard vs. Bélanger, 4 L. C. R., p. 255.

(†) Lynch and Hainault, 5 L. C. Jurist, p. 306. See also Troplong, *contrat de Mar*, vol. 4, p. 67., no. 3061.—18 Demolombe, no. 295, p. 324.

In the second place, by causing the property to remain in the possession of his son and of his children, the Donor, at least to the extent of the value of that property, rendered it impossible for them to make a claim for *aliments* against himself.

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And, thirdly, the Donor had an interest in depriving his son of the power of alienating that property, because under the 313th Act of our custom, the Donor was the person to succeed to the property, in the event of the Donee dying in the possession of it childless. For these reasons I think the prohibition d'aliéner in the case before us was a valid condition, and I therefore pass to the consideration of the question as to whether the Donee violated that condition by leaving the property in question to his wife by his last will and testament.

As shewing that the defense d'aliéner ought not be understood as referring to testamentary dispositions, the learned counsel for the Respondent drew our attention to a passage in Rousseau de Lacombe, which is as follows: Si le testateur a défendu à son héritier d'aliéner les biens sa vie durant et ajouté ces termes: "par ce moyen, les biens ne sortiront jamais de la famille," il en peut disposer librement par testament, même en faveur d'étrangers.†

But in the case supposed in the passage just quoted, the term of the limitation is the lifetime of the donee, whereas in the case before us the term of the limitation is the lifetime of the donor; and this difference it appears to me, makes the cases wholly unlike each other as to the point under consideration. The authority however, upon which the learned counsel for the Respondent mainly relied, is to be found in 2d Furgole p. 52, (Ed. 1777, p. 45), and is in the following words: "Un testateur peut-il disposer des biens dont l'aliénation est prohibée? Nous ne parlons pas des biens dont la loi ou la coutume défendent l'aliénation, comme sont les biens chargés de substitution ou fidéi-commis, et la portion des propres ou des acquêts à défaut de propres, que les coutumes désèrent aux héritiers du sang: Nous avons montré que le testateur ne peut pas disposer par testament.

Nous parlons des biens dont l'aliénation est prohibée par contrat ou par testament. Cette difficulté doit être résolue par cette distinction; ou la prohibition d'aliéner peut avoir l'effet d'un fidéi-commis, comme si elle est en faveur de certaines personnes, ou afin que les biens demeurent dans la famille, ou afin qu'ils ne sortent point de la famille; ou bien, elle n'a point l'effet d'un fidéi-commis. Quand la prohibition d'aliéner n'a point de cause, et qu'elle ne peut pas produire un fidéi-commis, rien n'empêche que le possesseur n'en puisse disposer par testament, parce que, dans ce cas, la prohibition se borne aux aliénations qui peuvent être faites par contrats entrevifs. C'est le sentiment commun des Docteurs."

The first observation which I desire to make with respect to the above passage is that it seems to make a distinction with respect to prohibitions testamentary alienations, and alienations by acts *inter vivos*, which is at variance with what many other highly esteemed authors have written on the subject.

According to Furgole, a prohibition to alienate if it be made *sans cause*, and be insufficient to create a fidéi-commis, cannot have the effect of preventing tes-

† Rousseau de LaCombe p. 673, verbo substitution, Sec. 1, Dia. 2, No. 2.

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tamentary prohibitions; but may have the effect of preventing alienations *inter vivos*, whereas, I believe almost all the other authorities establish that a *défense d'aliéner*, such as spoken of by Furgole, has no legal effect whatever.

"Ricard,* in a passage which I had lately occasion to quote in another case, says, "Les lois ont résolu, par une décision générale, que lorsque la prohibition est pure et simple et sans cause elle ne produit aucun effet."

Pothier † says, "La simple défense d'aliéner, lorsque le testateur n'a pas témoigné en faveur de qui il refusait cette défense, ne passe à la vérité que pour un simple avis, *nudum præceptum*, auquel celui à qui la défense est faite peut impunément ne pas déférer."

The authorities just cited which are conformable to the opinions of Henrys, Toulin, Troplong, and other writers, equally entitled to respect seem to me at variance with the distinction made by Furgole in the passage cited by the Respondent.

The second observation which I desire to make with respect to the passage quoted from Furgole is that the case thus referred to is where *la prohibition d'aliéner n'a pas de cause*, et ne peut pas produire un fidéi-commis; whereas in the present case the *prohibition d'aliéner* as I view it although it did not produce and was not intended to produce, a fidéi-commis, has a sufficient cause, inasmuch as it tends to protect the interests of the donor, as I have already shewn in several important respects.

The important question with respect to which the opinion of Furgole has been cited by the Respondent seems to me to be better treated by Ricard ‡ than any other author.

After adverting to the opinion of Faber who maintains, "que l'héritier prohibé d'aliéner a le pouvoir de disposer par testament des biens compris en la prohibition et qu'elle ne s'étend qu'aux contrats d'entrevifs;" and to the reasons assigned in support of that opinion Ricard gives his own opinion in the following words:

"Je ne puis, néanmoins, suivre ce sentiment en quittant l'opinion contraire qui est presque universellement reçue par tous les Docteurs, lesquels tiennent que quoique le testateur n'ait que simplement prohibé au légataire d'aliéner hors de la famille, il perd toute la liberté de disposer de la chose qui lui a été léguée aussi bien par testament que par contrat entrevifs."

"En effet, il est constant que ce mot aliéner comprend dans sa signification soit propre ou ordinaire *toutes sortes de moyens*, par lesquels un bien est transféré à un autre: C'est la définition que les Jurisconsultes donnent vulgairement à ce mot; *alienatio*, disent-ils, est *juris domini* que a nobis *translatio*, et cette définition est d'autant plus considérable qu'elle est autorisée par le texte de la loi. 1. C. de fundodotali. Est *alienatio omnis actus per quem dominium transfertur*. Si bien que comme le testament n'est pas moins translatif de propriété qu'un contrat, il s'en suit que c'est une espèce d'aliénation; ce mot n'ayant rien de particulier qui le fasse plutôt convenir aux dispositions entrevifs qu'aux actes de dernière

* Ricard donations, Vol. 2, p. 322, des substitutions, Traité 111, ch. 7, p. 1, No. 329.
† Pothier, Vol. 5, des substitutions, page 518.

‡ Ricard donations, Vol. 2, p. 326. Des substitutions, Traité 3, Chap. 7, part 1. No. 349.

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† Brillor

volonté. Aussi avons-nous une disposition formelle de la loi : Si quis 88 certum secundum nupt.,—qui décide nettement que le testament est compris sous le mot d'aliénation. Certum esse sancimus, quod etiam illa de cætero videbitur earundem fuisse rerum alienatio quæ in testamento genitoris vel genitricis, vel specialiter relinquendo, vel generaliter, heredem instituendo facta sit.*

In the Nouveau Denizart it is also said, "La défense d'aliéner comprend toutes sortes d'aliénations soit non gratuite comme la donation, soit gratuite comme la vente, l'échange, soit entrevifs comme celles qui viennent d'être nommées, soit à cause de mort comme l'institution d'héritier et de legs."

The writer then refers to the opinion of Faber and adds : "Mais son opinion est solidement réfutée par Ricard." And in Brillouin's Dictionnaire des Arrêts, verbo alienation,† the opinion of Faber and Ricard are referred to in the following terms : Faber tient que le prohibé d'aliéner n'est pas empêché par cette prohibition, de tester. Ricard tient le contraire, avec les autres Docteurs, parce que le mot aliéner comprend, dans sa signification, soit propre ou ordinaire, toutes sortes de moyens par lesquels un bien est transféré à un autre. "Est alienatio omnis actus per quem dominium transfertur, etc. L. I. C. de fundo dotali."

I think moreover that the weight of authority under the modern law of France also will be found to be in conformity with the opinion of Ricard. Demolombe, speaking of the défense d'aliénations, puts the question : "Mais comprendrait-elle aussi la défense de tester, de disposer par testament," and he says, "La Cour de cassation a décidé cette question négativement, 2 Janvier, 38, Bercher, Déc. 1838, 1. 634.

The case of Bercher, vs. Amiot, referred to by Demolombe in the passage just cited, will be found in the 30th Vol. of the journal du Palais, p. 553 ; and as it somewhat resembles the present case, without, however, going as far as one might suppose from the passage in Demolombe, I give the Report, which is short, as it is to be found in the collection last mentioned.

* Bercher vs. C. Amiot.

Les époux Bercher ont, par acte du 4 Juillet, 1827, fait un partage anticipé de tous leurs biens entre tous leurs enfants, sans réserve d'usufruit à leur profit et sous la condition que les donataires ne pourront, pendant la durée de cet usufruit, "vendre, échanger, hypothéquer ou aliéner de quelque manière que ce soit, tout ou partie des biens donnés sans le consentement des donateurs."

En 1831, Louis Bercher, l'un des enfants décédés sans postérité, laissant un testament par lequel il lègue 10,000 fr. à sa femme, la Dame Amiot, sur la part qui lui a été attribuée par la donation précitée. Les donateurs auxquels est demandé le paiement du legs, répondent que les biens par eux donnés à leurs fils doivent leur revenir libres de toutes charges, en vertu de la clause qui en prohibait toute aliénation de la part du donataire. Jugement qui, considérant que cette clause n'enlevait pas la faculté de disposer par testament et que par l'art 747, C. civ. les époux Bercher héritent exclusivement des biens de leur fils donataire prédécédé, les condamne au paiement du legs.

* Nouv. Deniz : Vol. 6, p. 75, "Défense d'aliéner." §2, N. 6, 2. also No. 7.

† Brillouin Dict. des arrêts, Vol. 1, p. 126, Verbo, Aliénation, No. 28.

Bourasse, et
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This judgment was confirmed by the Cour Royale de Paris, and afterwards on the 2d January, 1838, by the Cour de Cassation, one of the considerants of the judgment of the latter court being "attendu que la donation ne prohibait nullement au donateur les dispositions testamentaires attaquées par le Demandeur, et que la Cour Royale n'a pu violer les articles invoqués par cette interprétation qui était d'ailleurs exclusivement dans ses attributions." There is this difference in the case of Bercher *vs.* Amiot just cited, and the case before us, that in the present case the legacy impugned is a legacy of the very property held subject to the défense d'aliéner, which was not so in the case of Bercher *vs.* Amiot. Demolombe, as supporting the judgment in Bercher *vs.* Amiot, says, "Et l'on peut dire en ce sens, qu'autre chose est aliéner, autre chose est tester, et que la loi elle-même distinguant ces deux modes de dispositions ne défend pas toujours de tester à ceux auxquels elle défend d'aliéner." The author then gives his own opinion as follows;

"Mais cette solution serait à notre avis trop absolue; et même nous serions portés à penser que, généralement la condition de ne pas aliéner, du vivant du donateur imposée au donataire, devrait s'étendre à la disposition par testament comme la disposition entrevifs, c'est là, en effet, surtout une question d'interprétation de volonté; or n'est-il pas raisonnable que telle a été la volonté du donateur, surtout lorsqu'il a imposé cette condition dans le but de garantir l'efficacité d'un droit de retour à son profit? la circonstance qu'il aurait été dit que l'aliénation ne pourrait pas avoir lieu sans le consentement du donateur, serait encore une preuve de plus que la disposition par testament a été interdite au donataire. (comp. Bourges, 14 Déc. 9, 1852, Chabot, Déc. 1853, II., 468, Paris, 15 Avril, 1858, Creton, Dec. 1858, II., 362.)

The arrêt of the 15th April, 1858, referred to by Demolombe, will be found in the 60th, Vol. of the Journal du Palais, p. 612.

The marginal abstract is as follows:

La clause par laquelle, en faisant donation entrevifs de ses biens à ses enfans avec réserve d'usufruit, l'ascendant donateur a interdit aux donateurs, sous peine de révocation de la donation d'aliéner ou hypothéquer les biens donnés pendant la vie du donateur, n'est ni prohibée par la loi, ni contraire à l'ordre public, et a pour effet de réserver au profit du donataire le droit de retour successoral créé par l'art. 747, cod. Nap. par conséquent d'empêcher que les dits biens puissent être légués à son préjudice.

The arrêt of the 14th December, 1852, cited by Demolombe, will be found in the 62d Vol. Journal du Palais, p. 329, and the heading of that case is in the following words: "Est valable et obligatoire l'interdiction imposée par le donateur au donataire d'aliéner ou d'hypothéquer les biens donnés pendant la vie du donateur sans le consentement de celui-ci." "En pareil cas, l'interdiction d'aliéner doit s'entendre de tout mode de transmettre même par testament la propriété des objets donnés."

One of the considerants of the judgment of the 14th Dec., 1852, is in the following words: Que l'interdiction d'aliéner doit s'entendre de tout mode de transmettre, même par testament, la propriété des objets donnés. Que le consentement des donateurs étant réservé pour la validité de l'aliénation par cela

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même est exclue la faculté de transmettre par testament, puisque le consentement nécessaire ne peut intervenir."

In determining the present case it is proper to bear in mind the observation of Demolombe:

"La circonstance qu'il aurait été dit que l'aliénation ne pourrait avoir lieu des biens sans le consentement du donateur serait encore une preuve de plus que la disposition par testament a été interdite au donataire," a clause of that kind is also made the basis of one of the considerations in the arrêt of the 14th December, 1852, and a similar clause we must recollect is contained in the deed before us, which declares in the terms already mentioned that no alienation shall be made of the property in question for the period already mentioned. "Sans la permission par écrit des donateurs ou du survivant d'eux, sans laquelle condition le donateur déclare qu'il n'aurait pas consenti les présentes, et qu'elle n'est pas comminatoire, mais de rigueur."

I shall merely add that if the *défense d'aliéner* in the case before us is to be treated as valid, it must be so treated on the ground that it may reasonably be regarded as having been stipulated for the protection of the interests of the donor; and these interests, it is plain, were as liable to be defended by a testamentary disposition as by an act *inter vivos*. It would therefore be unreasonable to say that a stipulation which, in the most comprehensive term, forbids all alienation, was intended to include alienations by deeds *inter vivos*, and not to include alienations by will, because it seems to me certain that a testamentary disposition in favour of a person not the heir of the testator, which has the effect of making the thing bequeathed the property of another, must at least be considered in one respect as an alienation.

Upon the whole, after a careful consideration of the case, it seems to me upon principle, as well as upon authority, that the *défense d'aliéner* in the case before us is valid.

That it embraces testamentary dispositions as well as other description of alienations,—and therefore that the Appellant has reason to complain of the judgment of the Court below, in so far as it maintains the *legacy* of the property in question by the donee in favour of the Respondent.

Leblanc & Cassidy, for Appellant.

Judgment of Court below reversed.

H. Stuart, Counsel.

P. R. Lafrenaye, for Respondent.

Magloire Lanctot, Counsel.

(P. R. L.)

SUPERIOR COURT.

MONTREAL, 27th MAY, 1863.

Coram MONK, J.

Re: Will

Musson vs. Philbin.

Held:—1st When a property subject by law to the payment of *ods et ventes*, and other seigniorial dues has been sold apparently free of all charges, the purchaser is bound to be acquainted with the existence of such charges and is liable for the payment of the same.
2nd When the purchaser of real property refuses to take a title of it, a judgment of the Court will avail the vendor instead of a title deed signed by the vendor.

The Plaintiff in his declaration alleged that the Defendant at the city of Montreal on the 12th day of November, 1861, in and by a certain memorandum

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Beaud, et
Bourassa Fils,
et
Bedard, et vir.

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Philbin.

in writing agreed with the Plaintiff acting by his duly authorized agent and attorney, William Maxwell, to buy a property at Laprairie known as the Kerfut property and owned by the Plaintiff. The Defendant agreed to pay for the said land the sum of \$210, "to be paid in cash on passing the deeds, the purchaser assuming all dues, rents, et cetera, that might be then due and accrued since the sheriffs' sale of 1860, to wit the sale hereinafter recited whereby the said Plaintiff acquired the said lot of land and premises, said deed of sale to be completed on or before the 18th day of November, 1861."

The Plaintiff further alleged that although he had frequently offered both verbally and in writing, and by a notarial instrument to execute in Defendants' favor a title deed to the said land upon the terms set forth in the agreement to purchase, yet the Defendant had wholly refused and neglected to take a title from the Plaintiff.

The Plaintiff, by the conclusions and prayer of his declaration, asked that the said agreement of the 12th November, 1861, in relation to the purchase by the Defendant of the said Kerfut property might be declared in full force and obligatory upon the Defendant; and that the Defendant be ordered within such delay as the Court would appoint to sign and execute a title deed of the said property subject to the conditions of the said memorandum in writing and for the price therein mentioned, viz., that the said property be conveyed by the said Plaintiff to the Defendant, and that the Defendant should pay in cash the sum of \$210 with interest at the rate of 6% from the said 18th day of November, 1861, till paid. That the Defendant should thereby agree and bind himself to pay to the exoneration of the Plaintiff, all dues and rents, that is to say all seigniorial dues and rents of whatever nature to which the said property then was or might be found subject to, and which might be found to have become due since the sale to the Plaintiff of the said property by John Boston, Esquire, sheriff, and that in default of his so doing that the judgment of the Court might avail the parties in the cause as a title deed to the said property subject to the conditions and for the price aforesaid, and that the Defendant might be condemned to pay to the Plaintiff the sum of \$210 with interest thereon from the 18th November, 1861, till paid. And that the said property should be specially mortgaged and hypothecated by privilege of *baillieur de fonds* for the payment thereof with costs.

The Defendant pleaded that he was not bound by the memorandum of purchase, to pay the seigniorial dues on the land, and denied that he had ever refused to execute a title deed according to the conditions of the said agreement.

The Plaintiff proved the allegations of his declaration.

Per Curiam.—This was an action *ex vendito*, brought by the Plaintiff to compel the defendant to take a piece of land situate in the Seigniorie of Laprairie. The Plaintiff purchased the property in April, 1861, at Sheriff's sale. There was no reference in the deed to its being in the Seigniorie, nor any statement that there were any seigniorial dues upon it or that it was subject to Seigniorial operation at all. So far the Plaintiff's title disclosed no Seigniorial or other dues whatever. He seemed to have purchased the property to all intents and purposes free from

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every description of charge. On the 22nd November, 1861, the defendant bought this property owned by the Plaintiff, Mr. Thos. Mussen. The defendant assumed all dues, rents, &c., that might be then due and accrued, since the Sheriff's sale in 1860, said deed of sale to be completed on or before the 18th Nov., 1861. The defendant signed a memorandum stating that he accepted the memorandum of sale, and would comply with the conditions. The defendant finding out that it was charged with the commutation fine, and liable to a Seigniorial rent, refused to take the property. The Plaintiff offered him the title deed, but he refused it. The Plaintiff now brought his action, praying that if the defendant refused to take the property, the judgment of the Court should avail the Plaintiff in lieu of a notarial instrument. The amount of the defendant's plea was this, that he purchased the property free and clear of all charges, Seigniorial or other, and that if the property could be given to him free from these charges, he was willing to take it, but not otherwise. Secondly, he was willing to take the deed, if the Plaintiff would give him security against any demand for these charges. The Court had to determine whether the defendant was justified in his pretension that he purchased the property free from all Seigniorial charges. This property was situate in the Seignior of Laprairie, where by law the Seigniorial commutation fine is imposed. This was one of the exceptions in the law, and the defendant should have noticed it. As to the *Lods et ventes* there could be no doubt. They existed in virtue of the law, and the defendant was bound to know, not only that the commutation fine existed but that the *Lods et ventes* existed also. And being bound to know this much, he was bound to know all that of which he declared and complained that he was ignorant. But there was more than this. It seemed that a memorandum had been signed in which the defendant assumed "all dues, rents, &c.; that may have accrued since the Sheriff's sale of 1860, &c." This included everything. And if the dues and rents had accrued between the time of the Sheriff's sale and the date of the memorandum, was it not his business to know that they were accruing and would continue to accrue in the future? The defendant's pretension, therefore, that he purchased the property free of all charges, was not well founded. The other plea, that he would take the property on security being given, was illegal, and both pleas must be dismissed. The next point was: could the Court give the defendant a title. He purchased the property, and refused to pay for it. There would be no difficulty had it been an action *ex empto*, for the Court of Appeals had in this case sanctioned the conferring of a title on a man who appealed to it, although it seemed to be a strange exercise of authority. But in the case of an action *ex vendito*, there was no such precedent or authority for giving a title. A case had once before come before this Court, in which the party was condemned to take the property, but in that case the point had not been specifically raised, nor had the question been raised by the parties in the present case; under these circumstances, the case might perhaps seem to resolve itself into an action of damages. But the defendant had declared he would take the title if the Plaintiff gave it to him free from all charges. Now the Court held that the defendant had no right to annex such conditions, but as he had offered to take the title, judgment would go for the Plaintiff.

Mason
vs.
Phillips.

The judgment was thus *motivé*.

The Court, having heard the parties by their Counsel upon the merits of this cause, examined the proceedings and proof of Record, and having deliberated thereon, considering that the Defendant hath not established by legal or sufficient evidence the essential averments of his Pleas, firstly and secondly pleaded in this cause; and considering moreover that the said Pleas are unfounded in Law, doth dismiss the said Pleas: and proceeding to adjudicate upon the merits of this action, seeing that the Plaintiff hath proved by legal evidence the material allegations of his declaration doth maintain the Plaintiff's action, and in consequence doth adjudge and declare the agreement of the twelfth day of November one thousand eight hundred and sixty-one, in relation to the purchase by the said Defendant of the Kerfut property at Laprairie, to wit, that certain lot, piece or parcel of land situate, lying and being in the augmentation of the village of Laprairie de la Magdeleine in the district of Montreal, containing three hundred feet French measure on the line of St. Henry street, by one hundred and eighty feet in depth, be the same more or less, without any warranty as to precise measurement; bounded in front to the south by the said St. Henry street, in the rear by St. Paul street, on the west side by St. Ursule street and on the east side by Olivier Cardinal and Antoine Ste. Marie or their representatives, with two one story stone houses and their dependencies, as also a third house commenced in stone and partially covered in, and other dependencies thereon erected, upon the terms and conditions mentioned in the said agreement, to be in full force and obligatory upon the Defendant; and doth order the Defendant, within ten days after service upon him of this judgment to sign and execute a Title Deed of the said property subject to the conditions of the said memorandum in writing, and for the price therein mentioned, to wit, that the said property shall be conveyed by the said Plaintiff to the Defendant, and that he the said Defendant shall pay in cash the sum of two hundred and ten dollars currency with interest at the rate of six per centum per annum from the said eighteenth day of November one thousand eight hundred and sixty-one, till paid; and that he the Defendant shall thereby agree and bind himself to assume and pay to the exoneration of the Plaintiff all dues and rents, that is to say all seigniorial dues and rents of whatever nature to which the said property is or may be found subject and which may be found to have become due and accrued since the sale to the said Plaintiff of the said property by the late John Boston, Esq., then sheriff of the district of Montreal, on the second day of August one thousand eight hundred and sixty; and that in default of the said Defendant so doing, the present Judgment shall avail the parties in this cause as a Title deed to the said property subject to the conditions and for the price aforesaid.

And doth further adjudge and condemn the Defendant to pay and satisfy to the Plaintiff the said sum of two hundred and ten dollars currency, with interest thereon from the eighteenth day of November one thousand eight hundred and sixty-one, till paid, the whole with costs distrains to Messieurs Torrance and Morris, attorneys for the Plaintiff.

Judgment for Plaintiff.

Torrance & Morris, for Plaintiff.

John Monk, for Defendant.

(J. L. M.)

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QUEEN'S BENCH, 1863.

MONTREAL, 6TH JUNE, 1863.

Coram AYLWIN, J., DUVAL, J., MEREDITH, J., MONDELET, A. J.,
BERTHELOT, A. J.

No: 100.

BENJAMIN LYMAN, *et al.*,

(*Plaintiffs in the Court below,*)

APPELLANTS,

AND

TANOREDE BOUTHILLIER,

(*Defendant in the Court below,*)

RESPONDENT.

Held:—1. That an entry at the Customs by invoice, in which the goods are undervalued, is presumably a fraudulent entry.

2. That where the owners in any way benefit by the entry, as by taking possession of part of the goods, they cannot question the validity of the entry.

3. That when the invoice mentions, in effect, that the goods are consigned to the party making the entry, he will be held to be the consignee of such goods, within the meaning of the Customs Acts, even although the Bills of Lading of such goods affirm that the goods are to be delivered to other parties (the owners) or their assigns.

4. That when goods have been undervalued in the invoice and entry, for the purpose of avoiding payment of part of the duties payable thereon, they are so completely forfeited, that the owners are debarred from disputing the legality or proof of the seizure and sale of the goods.

This was an appeal from a Judgment rendered by THE HON. MR. JUSTICE SMITH, in the Superior Court at Montreal, on the 30th day of March, 1861, dismissing the Appellants' action against the Respondent.

The Appellants, Wholesale Chemists and Druggists at Montreal, under the firm name of Lyman, Savage & Co., instituted an action on the 6th day of June 1859, against the Defendant, collector of Customs at the Port of Montreal, to recover the sum of \$763.90 as damages.

The allegations and prayer of the Appellants' declaration were as follows:—

"That the said Plaintiffs, on the 16th day of April, 1859, at Montreal aforesaid, were, and for more than 6 weeks immediately preceding that day had been the owners and proprietors of 19 barrels of Albertine oil, marked and numbered from 1658 to 1676 consecutively, and of four casks of Albertine oil marked and numbered from 314 to 317 consecutively.

That the said several barrels and casks of oil were purchased by the said Plaintiffs in St. John, New Brunswick, and by them imported and conveyed from St. John aforesaid to Portland in the State of Maine, by the schooner "Pearl," and thence by the Grand Trunk Railway to the port of Montreal.

That the said several barrels and casks contained 1150 gallons of the said oil, and were so purchased by the said Plaintiffs at St. John aforesaid, at the rate of 90 cents per gallon, or \$1035 for the whole of the said 19 barrels and 4 casks, that being the value of the said oil at the said place of importation.

Benj. Lyman
et al,
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That the said several barrels and casks of oil, so purchased and owned by the said Plaintiffs, were imported and conveyed as aforesaid by and were consigned to the said Plaintiffs and arrived at the said Port of Montreal in the month of March last.

That on the 12th day of April last, at Montreal aforesaid, the said Plaintiffs by and through the said Alfred Savage, offered to the said Defendant, as such Collector of Customs aforesaid, to make the necessary entry of the said several barrels and casks of oil and to make the declaration required by the Provincial Statute, 22nd Victoria, chapter 76, and the oath in that behalf required from the said Plaintiffs, as such owners and importers, and did also then and there offer and tender to the said Collector the sum of \$207 currency that being the duty payable by law in respect of the said goods, all which the said Defendant then and there wholly refused to allow and accept, and they the said Plaintiffs did also then and there demand of the said Defendant, as such Collector, his warrant to deliver the said goods which he also refused to grant.

That in consequence of such refusal aforesaid, they the said Plaintiffs, afterwards, to wit, on the 14th day of April last through the ministry of Hunter and his colleague, Notaries public, re-offered to the said Defendant, as such Collector, to make the said entry, declaration and oath, and did also tender and offer to him in good current money of this Province the said amount of \$207 currency as and for such duty aforesaid, all of which the said Defendant then and there again refused to allow and accept and they the said Plaintiffs did also then and there re-demand of the said Defendant, as such Collector, his warrant aforesaid which he again refused to deliver, as the whole will more fully appear by reference to an authentic copy of the Notarial demand and protest, in that behalf made by the said Notaries, herewith produced and filed, and to which the said Plaintiffs particularly refer as forming part of these presents.

That notwithstanding the said several premises the said Defendant, well knowing the said several premises, afterwards, to wit, on the 16th day of April last, under color of his said office and under the false pretext that the said several packages of oil had been seized, forfeited and condemned for infraction of the Revenue laws, but without any legal seizure, forfeiture and condemnation thereof having ever in fact been made or effected, and without any legal right or title so to do whatsoever, did sell or cause to be sold the whole of the said 23 packages of oil, with the exception of 9 of such packages, which the said Defendant had previously ordered to be delivered to the said Plaintiffs, by public auction, thereby forcibly and without any legal right or title so to do, depriving the said Plaintiffs of their aforesaid property and converting the same to his, the said Defendant's own use and benefit, to the great loss and damage of the said Plaintiffs.

That the 14 packages of the said oil so belonging to the said Plaintiffs, and so illegally sold and disposed of by the said Defendant, contained the quantity of 693½ gallons of the said Albertine oil, and were on the said 16th day of April last, and still are of the value, in Montreal aforesaid, of \$370.00.

Wherefore the said Plaintiffs aver they have a right to bring suit and pray, and they hereby do bring suit and pray, that the said Defendant may be adjud-

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ged and condemned to pay and satisfy to the said Plaintiffs the said amount of \$970.90 currency, less the said duty or sum of \$207 currency, to wit, the sum of \$763.90 currency, and interest thereon from the said sixteenth day of April last, until actual payment and costs of suit."

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The Respondent pleaded specially as follows:—"The Defendant in this cause not admitting but on the contrary specially denying all and every of the allegations of Plaintiffs' declaration save and except such as may be hereinafter expressly admitted to be true, by this his exception to the action and demand of the said Plaintiffs, saith: That true it is that the oil mentioned and referred to in the Plaintiffs' declaration was at the several dates mentioned in the declaration, and at the time of their importation from St. John, New Brunswick, worth the sum of ninety cents per gallon, such being the fair market value thereof at St. John aforesaid, but the Defendant avers that the packages of oil referred to in the said declaration were by the exporters thereof, consigned to Messrs. Jacques, Tracey & Co., a commercial firm doing business at Montreal under that name, and that the said firm of Jacques, Tracey & Co., did, after the arrival of said packages of oil at the Port of Montreal, to wit, on or about the 5th day of March last past, make entry of the said packages of oil together with other packages of oil in Her Majesty's Customs at the Port of Montreal upon a certain false and fraudulent invoice, then and there produced by the said Jacques, Tracey & Co., as an original Invoice of said goods, in which said Invoice the whole of the said packages of oil therein mentioned and which included the packages referred to in Plaintiffs' declaration had been undervalued (the value thereof being in said invoice represented as 70 cents per gallon) with intent and for the purpose of avoiding the payment of part of the duty by law payable on such oil, contrary to the form of the statutes in such case made and provided, whereby and by force of the statutes in that behalf made, the said packages of oil included in the said invoice became and were forfeited to and for the use of Her Majesty, according to the provisions of the said Statutes, and thereupon at the city of Montreal on the 8th day of March last past the several packages of oil mentioned in the declaration were accordingly by the said Defendant in his capacity of Collector of Customs at the Port of Montreal seized, as forfeited to Her Majesty, and then afterwards until the eighth day of April last past, being the period of one month provided by law, remained under seizure, and having remained under seizure for that period unclaimed the said packages of oil then and there on the date last mentioned became and thence afterwards were condemned according to the provisions of the statutes in that behalf.

That the said Invoice upon which the said entry was so made by the said Jacques, Tracey & Co., was forwarded by the exporters and manufacturers of the said oil, the New Brunswick Oil Works Company, to the said Jacques, Tracey & Co., as consignees of the said oil, and in which the value and price of the said oil were wilfully and fraudulently undervalued and underrated to the extent of twenty cents upon each gallon, with intent and for the purpose of avoiding payment of a part of the duty by law leviable and payable thereon, and was so forwarded to the said Jacques, Tracey & Co., for the purpose of enabling them to make entry thereof in Her Majesty's Customs at the Port of Montreal

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upon the said false and fraudulent Invoice, and by that means to defraud the revenue.

That the said consignees of the said packages of oil, to wit, the said firm of Jacques, Tracey & Co., at the time they entered the said packages of oil in Her Majesty's Customs at the Port of Montreal and produced the said invoice, knew that the said packages of oil were undervalued in the said invoice, and that the price and value thereof at St. John aforesaid, was ninety cents per gallon, instead of seventy cents mentioned in the said invoice.

That the said Jacques, Tracey & Co., having so fraudulently entered the twenty-three packages of oil mentioned in the declaration, illegally and fraudulently obtained a delivery order for the said packages of oil, and fraudulently obtained from the Officer of Customs at Longueuil, nine of the said packages of oil, being the nine packages referred to in the declaration, before the said fraud was discovered, and the remaining fourteen packages were upon such discovery of the said fraud and before any delivery thereof had been made by the said Officer of Customs, and whilst the same still remained detained by said Officer of Customs for investigation, seized as forfeited.

And the said Defendant further avers, that he specially denies that the said fourteen packages of oil were sold by him the Defendant in the manner and under the circumstances alleged in the declaration, or that he converted the proceeds to his own use and benefit; but on the contrary the Defendant avers, that the said fourteen packages of oil having been legally seized as forfeited in the manner and for the causes hereinbefore stated, and having remained under seizure unclaimed for the period of one month, and been condemned according to the provisions of law in that behalf, the said Defendant in his said capacity and as by law he was bound to do, caused the said fourteen packages aforesaid to be sold according to law on the sixteenth day of April last past.

That at the periods of the alleged offer and tender mentioned in the said declaration, he the said Defendant in his capacity of Collector of Customs at the Port of Montreal, had no authority or power to accept of said offer and tender the said packages of oil having been previously thereto forfeited, seized and condemned for the reasons, and in the manner hereinbefore stated.

That he, the said Defendant, in all that he did, acted in his capacity of Collector of Customs as aforesaid, in accordance with the requirements of the law, and as he was bound to do, and by reason thereof, the said Plaintiffs cannot have or pretend to have any claim or recourse whatever against him the said Defendant."

2nd. "And the said Defendant without waiver of his foregoing exception, and not admitting, but on the contrary denying all and every of the allegations of the Plaintiffs' declaration, save and except such as may hereinafter be expressly admitted, by this his second exception to the action and demands of the said Plaintiffs, saith :

That admitting the said packages of oil mentioned in the declaration to have been purchased by the said Plaintiffs at St. John, New Brunswick, at the price of ninety cents per gallon, and that the said sum of ninety cents per gallon was the value of said oil, at the place of importation aforesaid, still the said De-

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Defendant avers that when the said goods were exported from St. John aforesaid and forwarded to Montreal, they were consigned to Messrs. Jacques, Tracey & Co., a commercial firm doing business under that name at the city of Montreal, and who before and at the time the said goods were forwarded as aforesaid, had been and were the agents in Montreal of the manufacturers and exporters of said oil; and the said goods were so consigned to the said Jacques, Tracey & Co., with full knowledge and consent of the said Plaintiffs.

That the said Plaintiffs were informed before the arrival of said packages of oil by Jacques, Tracey & Co., that the said goods were on their way, and they the said Jacques, Tracey & Co., were instructed and requested by Plaintiffs to pass entry thereof in Her Majesty's Customs at the Port of Montreal, on their arrival, and moreover then and there consented to the said Jacques, Tracey & Co., acting as their agent in that behalf.

That Plaintiffs had previously imported from the same place and from the same persons similar oil, paying for the same at such place of importation a higher rate than seventy cents per gallon, and nevertheless caused entry thereof to be made in Her Majesty's Customs at the Port of Montreal, by the said Jacques, Tracey & Co., upon a false invoice in which the real value of, and price paid for the said oil was wilfully misrepresented, and in which the said oil therein mentioned had been undervalued with the intent and for the purpose of avoiding payment of a part of the duty by law payable thereon, contrary to the form of the Statutes in such cases made and provided.

And the said Defendant avers that on or about the 4th day of March last past, the packages of oil mentioned in the said declaration, arrived; and that on the following day entry of the same was made in Her Majesty's Customs at the Port of Montreal, by the said Jacques, Tracey & Co., to whom the same were consigned, they, the said Jacques, Tracey & Co., then and there producing for the purposes thereof a certain invoice of said packages of oil, together with other packages of oil, and which said invoice was false and fraudulent in representing the price and value thereof to be seventy cents per gallon, and in which the several packages of oil therein mentioned and which included those mentioned in the declaration, had been undervalued, with intent and for the purpose of avoiding the payment of duty or of part thereof, which by law was leviable and payable on the same, contrary to the form of the Statutes in such cases made and provided, whereby and by force of the Statutes in that behalf made, the said packages of oil included in the said invoice became and were forfeited to and for the use of Her Majesty, according to the provisions of the said Statute, and thereupon at the city of Montreal, on the eighth day of March last past, the several purchases of oil mentioned in the declaration were accordingly by the said Defendant, in his capacity of Collector of Customs at the Port of Montreal, seized as forfeited to Her Majesty, and thence afterwards until the eighth day of April last past, being the period of one month provided by law, remained under seizure, and having remained under seizure for that period unclaimed, the said packages of oil then and there on the date last mentioned, became and thence afterwards were condemned according to the provisions of the Statutes in that behalf.

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That the said invoice upon which the said entry was so made by the said Jacques, Tracey & Co., was forwarded by the exporters and manufacturers of the said oil, the New Brunswick Oil Works Company, to the said Jacques, Tracey & Co., as consignees of the said oil, and in which the value and price of the said oil were wilfully and fraudulently undervalued and underrated to the extent of twenty cents upon each gallon, with intent and for the purpose of avoiding payment of a part of the duty by law leviable and payable thereon, and was so forwarded to the said Jacques, Tracey & Co., for the purpose of enabling them to make entry thereof in Her Majesty's Customs at the Port of Montreal, upon the said false and fraudulent invoice, and by that means to defraud the revenue.

That the said consignees of the said packages of oil, to wit, the said firm of Jacques, Tracey & Co., at the time they entered the said packages of oil in Her Majesty's Customs at the Port of Montreal, and produced the said invoice, knew that the said packages of oil were undervalued in the said invoice, and that the price and value thereof at St. John aforesaid, was ninety cents per gallon instead of seventy cents mentioned in the said invoice.

That the said Jacques, Tracey & Co., having so fraudulently entered the twenty-three packages of oil mentioned in the declaration, illegally and fraudulently obtained a delivery order for said packages of oil, and fraudulently obtained from the Officer of Customs at Longueuil, nine of the said packages of oil, being the nine packages referred to in the declaration, before the said fraud was discovered, and the remaining fourteen packages were, upon such discovery of the said fraud, and before any delivery thereof had been made by the said Officer of Customs, and whilst the same still remained detained by the said Officer of Customs for investigation, seized as forfeited.

And the said Defendant further avers, that the said Plaintiffs having so authorized and instructed the said Jacques, Tracey & Co., to make entry of said packages of oil on their arrival, and having consented that they should act as their agents to that behalf as hereinbefore stated, they the Plaintiffs were bound by the act of the said Jacques, Tracey & Co., in so making a false entry of said oil, more particularly as Plaintiffs knew long before the arrival of the said oil, that the actual value and price of the same was ninety cents per gallon, and moreover had in their possession, before the arrival of said oil, the invoice forwarded to them, and produced as one of their exhibits, and nevertheless fraudulently retained the said invoice, and suffered and allowed the said Jacques, Tracey & Co., to make the said entry upon a false invoice in which the said oil was undervalued, with the intent and for the purposes aforesaid.

That moreover the said Plaintiffs knowingly participated in the fraud so committed by the said fraudulent entry made by the said Jacques, Tracey & Co., upon the said false and fraudulent invoice forwarded to them as consignees of said oil; and that the Plaintiffs knowing that the said Jacques, Tracey & Co. had passed entry thereof in Her Majesty's Customs paying duty thereon, at the rate of seventy cents only per gallon, and had thus fraudulently obtained a delivery order for the said oil, did receive from the said Jacques, Tracey & Co., the said delivery order, and acting upon the same, did succeed in obtaining from the Officer of Customs at Longueuil, where the said oil was stored, nine of the

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said packages of oil (being the nine packages referred to in the declaration,) before the said fraud was discovered, and thereby the said Plaintiffs knowingly and wilfully did attempt to carry out the said fraud by obtaining possession of a portion of the said oil, knowing of such false and fraudulent entry so made by their said agents.

That the remaining fourteen packages, being still in the possession of the said Officer of Customs, were upon discovery of the said fraud legally seized as forfeited, and before the Plaintiffs obtained possession thereof.

And the said Defendant further avers that he specially denies that the said fourteen packages of oil were sold by him the Defendant in the manner and under the circumstances alleged in the Declaration, or that he converted the proceeds to his own use and benefit; but, on the contrary, the Defendant avers that the said fourteen packages of oil having been legally seized as forfeited in the manner and for the cause hereinbefore stated, and having remained under seizure unclaimed for the period of one month, and being condemned according to the provisions of law in that behalf, the said Defendant, in his said capacity, and as by law he was bound to do, caused the said fourteen packages of oil to be sold according to law on the sixteenth day of April last past.

That at the period of the alleged offer and tender mentioned in the said declaration he the said Defendant, in his capacity of Collector of Customs at the port of Montreal, had no authority or power to accept of said offer or tender, the said packages of oil having been previously thereto forfeited, seized and condemned for the reasons and in the manner hereinbefore stated.

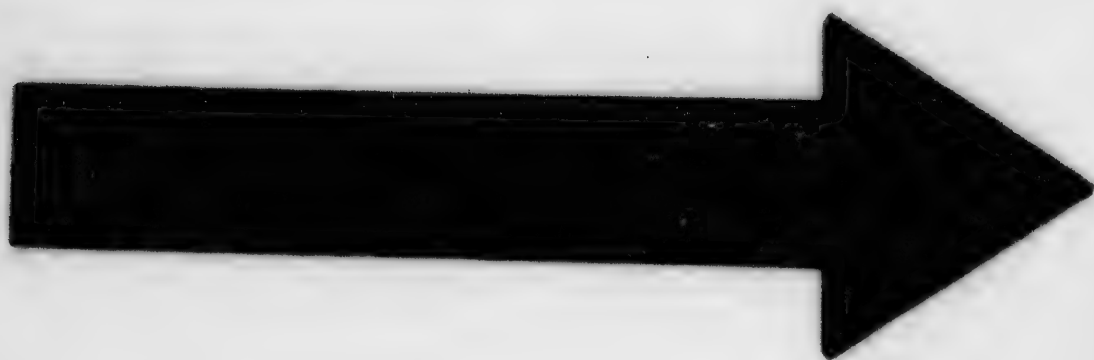
That he, the said Defendant, in all that he did, acted, in his capacity of Collector of Customs as aforesaid, in accordance with the requirements of the law, and as he was bound to do, and by reason thereof the said Plaintiffs cannot have or pretend to have any claim or recourse against him the said Defendant."

The Respondent also filed a *Défense au fonds en fait*.

The Appellants replied specially to the first of said Pleas as follows:

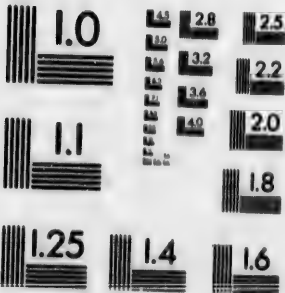
"The said Plaintiffs for answer to the plea by the said Defendant in this cause firstly pleaded and filed, and by him styled Exception, say, that Jacques, Tracy & Co., in said plea mentioned, were not the consignees of the oil therein and in the Plaintiffs declaration referred to: the said oil having been purchased by and consigned to the Plaintiffs.

That the said Jacques, Tracy & Co. had, on many occasions previously, made entries at the Custom House, here, of divers large quantities of the same description of oil which had been consigned to them, although the same was the property of the Plaintiffs and purchased by them at a rate higher than 70 cents per gallon. That the said Plaintiffs always understood that all such entries had been made by appraisement and not by Invoice, and that until after the pretended seizure, in the said plea referred to, the said Plaintiffs were wholly ignorant of any such entry having been made otherwise than by appraisement. That sometime before the arrival of the oil, the subject matter of the present suit, the said Jacques, Tracy & Co., or some one on their behalf, called at the office of the Plaintiffs and informed their book-keeper that the oil was on the way, and thereupon he intimated to the party who called that the said Jacques, Tracy &



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(ANSI and ISO TEST CHART No. 2)



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Co. might enter the same on arrival, as on former occasions, that is to say and meaning thereby that they might make such entry by appraisement.

That the said Plaintiffs personally knew nothing whatever of the interview aforesaid with their said book-keeper until after the said pretended seizure, and that they the said Plaintiffs personally knew nothing of the arrival of the said oil or of the pretended entry thereof set up in the said plea, until the evening preceding the said pretended seizure, and that they were then, and until after the said pretended seizure, under the impression that such entry had been made, as formerly, by appraisement.

That moreover the pretended entry of the said oil so alleged in the said plea to have been made by the said Jacques, Tracy & Co. on the fifth day of March, 1859, was not made by them, but was in fact made by one Thomas Craig, who pretended to enter such oil as the property of "Huson, Bros. & others."

And the said Plaintiffs say, that the said pretended entry was not made by any person having any authority whatever to make the same, and was not, and is not, and cannot be held in law to be an entry of the said oil, and this to the knowledge of the said Defendant, before and at the time of the pretended seizure so made by him of the said oil.

And the said Plaintiffs further say, that true it is they never made any formal claim as provided by the statute in the case of a legal seizure (which the said pretended seizure is not and cannot be held in law to be) but, at the suggestion of Her Majesty's Commissioner of Customs for this Province, they the said Plaintiffs shortly after the said pretended seizure, memorialised that functionary with a view to an amicable arrangement of the difficulty subsisting between them and the Defendant. That the Plaintiffs, at all times before and after so doing, and until the rejection of their petition in that behalf, were led by the Commissioner to believe that there would be no difficulty whatever in regard to the matter, and that the said pretended seizure would be removed, but that, notwithstanding the assurance so given to the Plaintiffs, their said petition was rejected by the said Commissioner, and this after the delay had expired for making such formal claim aforesaid under the said statute.

And the said Plaintiffs lastly say, that all and every the allegations, matters and things in the said plea set forth and contained, except in so far as the same exactly correspond with the allegations of the said declaration or are hereinbefore expressly admitted to be true, are false, untrue and unfounded in fact, and the said Plaintiffs hereby expressly deny the same and each and every thereof; and that the same are moreover insufficient in law."

A like special answer was filed to the Respondent's second plea and a replication to the *Defense en fait*.

After the adduction of evidence and final hearing on the merits, the Court below pronounced the following judgment:—

"The Court *** considering that the said Plaintiffs have failed to establish any legal right by reason of anything alleged and proved, to have and maintain the conclusions of their said action, and further considering that the said Defendant hath fully proved the allegations of his said exceptions as pleaded by him, and that the twenty-three casks of oil, for the value of fourteen of which the present

action is instituted, were duly entered at the Custom House by the firm of Jacques, Tracy and Co. on the seventh day of March, one thousand eight hundred and fifty-nine, who were then the agents of the vendors of the said twenty-three casks of oil, as well as of the said Plaintiffs, and were the consignees of the said twenty-three casks of oil for the purpose of entering the said oil at the Customs and of delivery thereof to the purchasers thereof, to wit, the said Plaintiffs; and further considering that at the time of entry thereof by the said Jacques, Tracy and Co. as such agents and consignees, they did present to and offer to the Collector of Customs, an Invoice of the said twenty-three casks of oil as bound to do by law, and did otherwise perform and comply with the requirements of the statute for making a valid and effectual entry of the said oil, and this with the knowledge and consent of the said Plaintiffs; and further, considering that in and by the said Invoice, the value of the said oil was therein stated for the purpose of entering the same, to be of the value of seventy cents per gallon at the place of purchase and shipment thereof, and that the said sum of seventy cents was then and there declared to be the true value thereof, as shewn by the said Invoice; and further, considering that the said entry so made on the Invoice then and there produced, was fraudulent in this, that it did not exhibit the true value of the said oil as required by the said statute, and that such oil was falsely undervalued for the purpose of defrauding the revenue; and further, considering that at the time of the entry of the said oil by the said Jacques, Tracy and Co. as such agents and consignees aforesaid, the said Plaintiffs were in possession of a just and true Invoice of the said oil, in which the value of the said oil was therein stated to be ninety cents per gallon, and that by not producing and exhibiting the said Invoice at the time of the entry of the said oil as they were bound to do by law, and by allowing the said Jacques, Tracy and Company their agents aforesaid to make the entry on the false and fraudulent Invoice in which the value of the said oil was stated to be seventy cents per gallon, the said Plaintiffs did thereby become chargeable with fraudulently undervaluing the said oil as aforesaid; and considering that by reason of such fraudulent entry effected for and on behalf of the said Plaintiffs, with a full knowledge of all the circumstances connected with the said entry, the said twenty-three casks became liable to forfeiture, and that they were so seized and forfeited as set forth in the exceptions of the said Defendant; and further, considering that the said Plaintiffs have failed to shew by reason of anything alleged or proved, that the said twenty-three casks of oil were not legally seized and forfeited as aforesaid; and further, considering that if there existed any good and sufficient reason for declaring the seizure and forfeiture to be invalid, illegal, or inoperative in law, it was the duty of the said Plaintiffs to have claimed the said oil when the same was advertised and labelled for sale according to the provisions of law within the period of one month as provided, and that the said Plaintiffs not having so claimed the said oil as illegally forfeited by reason of the entry of their agents as aforesaid, the said Plaintiffs are now debarred from impugning the validity of the said forfeiture, the Court doth maintain the exception pleaded by the said Defendant, and doth dismiss the present action with costs.

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Bethune, for Appellants. (After stating pleadings, &c.) On the 12th April, 1859, Alfred Savage, one of the Appellants, duly offered to make entry of the oil in question and pay the duty thereon as on 90 cents per gallon, and the offer being rejected by the Collector, it was reiterated through Notaries Public, on the 14th April, 1859.

On the 16th April, 1859, the Respondent sold the Oil by Public Auction. The reason assigned by the Respondent for so doing is stated in his pleas to be that on or about the 4th day of March, 1859, the Oil was entered at the Custom House here, with other packages of Oil, by "Jacques, Tracey & Co., to whom the same were consigned;" that in making such entry they did so, under the instructions and at the request of the Appellants, and "as their agents;" that they "produced for the purposes thereof a certain invoice," in which the Oil "had been undervalued, with intent and for the purpose of avoiding the payment of the duty or of part thereof which by law was leviable and payable on the same," that by reason of such entry and undervaluation the said Oil became and was "forfeited to, and for the use of Her Majesty;" that the said Oil "was upon such discovery of the said fraud, and before any delivery thereof by the said Officer of Customs, and whilst the same still remained detained by the said Officer or Officers of Customs for investigation, seized as forfeited;" and "that the said fourteen packages of Oil, having been legally seized as forfeited, in the manner and for the causes hereinbefore stated, and having remained under seizure unclaimed for the period of one month, and being condemned according to the provisions of law in that behalf, the said Defendant in his said capacity, and as by law he was bound to do, caused the said fourteen packages of Oil to be sold according to law."

According to the defence therefore, in order to render the sale by the Defendant legal, the Oil was sold as "condemned according to the provisions of law in that behalf," after it had been "legally seized as forfeited," and such forfeiture was the result of an entry by invoice, in which the Oil "had been undervalued, with intent and for the purpose of avoiding the payment of the duty or of part thereof." And lastly, that no claim was made by Plaintiffs, within one month from such seizure and condemnation.

The law on which this defence rests is the 10 and 11 Vic. Ch. 31, §. 48, which enacts that all goods "seized as forfeited" * * * "shall be deemed and taken to be condemned, and may be dealt with accordingly, unless claimed within one calendar month from the day of seizure,"—and the 12 Vic. Ch. 1. S. 18, which enacts that "if in any invoice or entry any goods shall have been undervalued, with such intent aforesaid, (viz—"for the purpose of avoiding the payment of the duty or any part of the duty on such goods") or if the Oath or affirmation made with regard to any such invoice or entry shall be wilfully false in any particular, then * * * the goods included in such invoice or entry shall be forfeited."

The Appellants respectfully submit the following points:—

1.—There could be no legal sale, without an *information*, exhibited and notified according to the requirements of the 10th and 11th Vic. Ch. 31, §§. 51, 52, & 59, and a previous seizure of the oil as forfeited.

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On the presumption that the goods were really seized as forfeited, and were unclaimed within one calendar month from the day of seizure, and were consequently deemed and taken to be condemned, the Respondent has interpreted the words of the 48th Sect. of the 10th and 11th Vic. ch. 31,—“may be dealt with accordingly,”—to mean, that he might do what he pleased with them and sell them by Public Auction, or otherwise, “without any formal condemnation,” or other legal preliminary formality whatever.

Now, by the 51st and 52nd Sections of the same Statute, it is distinctly enacted “that all penalties and forfeitures * * * shall and may be prosecuted, sued for, and recovered,” &c., &c. And the 58th section as distinctly enacts, that in order to render goods liable to “be sold without any formal condemnation thereof,” an information must have been exhibited in the proper Court, “during one calendar month.” And, in order to remove all doubt whether or not these sections, were intended to include the class of case covered by the 48th Section, it is “specially provided, that no claim shall be admitted, “unless notice thereof shall have been given to the collector, within one calendar month from the seizure as aforesaid.” It is evident therefore, that the Collector entirely misapprehended the legal significance of the enactment,—“dealt with accordingly,”—and that these words imported, as they evidently do, a compliance with the requirements of the sections of the statute above specially referred to.

According to the Respondent's own pretension, however, it is manifest, that to entitle him to deal with the Appellant's property in the summary manner in which he did, the goods must have been actually “seized as forfeited,” and due proof of “the day of seizure” made, otherwise, the fatal delay of “one calendar month,” which was only to run “from the day of seizure,” never occurred, and the goods consequently were never liable to “be deemed and taken as condemned.”

In the Respondent's fifth articulation of facts, the seizure is stated to have been made on the 8th of March, 1859, but of this fact there is no legal evidence whatever of record. Mr. Jordan's verbal statement, that from his notes in his office, the seizure was made on that day, *not by himself, however*, for he says “*I was not the seizing officer*,” does not of course establish the fact.

The only written document of record referring to the detention of the goods is the exhibit O (Paper 47 of Record) produced by Maçon, a witness. It has no date, but he states it was handed to him on the 7th of March, 1859. As the seizure is stated to have been made by the Respondent on the 8th of March, this document cannot be the *acte* of seizure, moreover it is a mere order to “stop all delivery” of the oil, and Jordan characterizes the paper as a “Counter order.”

It is also to be borne in mind that according to the Respondent's own pleas, “the goods, “before any delivery thereof had been made by the said Officers of Customs” (who were in possession thereof from the time of their arrival at Longueuil), were “detained for investigation,”—evidently according to M. Jordan's, and Phillips' evidence, on this “Counter order” of the collector, and the seizure is alleged to have taken place while they were so detained. But, not only is there no *acte* of seizure or even Copy thereof produced, but there is every reason to suppose that none was ever made. Mr. Jordan, who was not the seizing officer, says, that he was the person who signed the seizing report and left it with

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the collector, and Mr. Maçon produces a printed form (paper Z Z) showing certain printed questions to be answered *by the seizing officer* in all such reports. It is of course intended to be inferred from all this that Mr. Jordan's report was in reality the *acte* of seizure. It is plain, however, that a report by a party *not* the seizing officer can be no evidence of the fact of a seizure, and as neither the Report itself, which Mr. Jordan says he handed to the collector, nor even a copy of it is filed, we can only conclude that the Report has no legal significance whatever in the present case.

2.—There could be no *legal seizure* without an *entry* of the Oil, and in *intent* to defraud the Customs, in the "Invoice or Entry," or in the "Oath" made with regard to the same.

Now the only persons who can "validly make any entry" are the "owner," "consignee or importer," or "any Attorney or Agent duly thereunto authorized" by a written instrument, which he shall deliver to and leave with the Collector.—12 Vic. Ch. 1, §§. 8 & 23.—And where such entry is not made by "the owner, consignee or importer," there must be attached to the Bill of Entry * * a declaration by the owner, consignee, or importer, * * to the same effect as the Oath or affirmation (*viz.* as per Schedule B annexed to 12 Vic. Ch. 1.), adapting the form and words to the case, distinctly referring to the invoice presented with such Bill of Entry, and *signed by such owner, importer, or consignee, * * either in presence of the agent making the entry, who shall attest the signature, or of some Justice of the Peace or Notary Public who shall attest the same.*"—22 Vic. Ch. 76, S. 5, sub-section 1. (Statutes of 1858.)

The entry (Paper No. 15 of the Record) in the present case was made by "Thomas Craig," the clerk and duly authorized Attorney (Paper No. 54 of the Record) of Jacques, Tracey & Co., who were *not* either the owners, importers, or consignees of the Oil; the Oil on the contrary, being the property of and consigned to the Appellants, who imported the same.

That the Appellants were the *owners* is proved by their Book-keeper, Clare and by the Invoice or Bill of Sale, Paper No. 3 of the Record. And that they were also the *consignees or importers* is also proved by Clare, and by Bill of Lading signed by the Master of the Schooner Pearl (Paper No. 4 of the Record) which directs that the goods are "to be delivered * * at the Port of Portland" * * unto Lyman, Savage & Co., "or their assigns;" also by the receipt granted by the Grand Trunk Railway Co. to the Master of the Schooner (Paper No. 5 of the Record), which undertakes that the goods are "to be conveyed" * * and delivered to Messrs. Lyman, Savage & Co., Longueuil, C. E.; also by the advice note (Paper No. 6 of the Record) of the Grand Trunk Railway Company, dated at Longueuil, and addressed to "Lyman, Savage," by which they were informed, that the goods "*consigned to you have arrived this day;*" and lastly by letter from the shipper (Paper No. 44 of the Record) addressed to the Respondents, to the following effect,—"*I have now the pleasure to hand you Invoice and B. of L. twenty-three packages Albortine Oil, shipped per Schr. 'Pearl' to Portland, to your address. I am shipping other parcels, by the 'same vessel, consigned to Messrs. Rhynas & Starr, as forwarding Agents.*"

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"I presume *you* will attend to Ins. of present ship't."

The *other* parcels referred to in the letter are evidently the other goods which were entered by Jacques, Tracy & Co.'s Clerk, on the occasion in question, and destined for Upper Canada, and which were received by that firm, in the same way as Rhynas & Starr received them, as "*forwarding agents*."

Moreover, Jacques, says (Page 9 of the Appellant's *factum*) "The Plaintiffs "in this cause were the *consignees* of the twenty-three casks of Oil which were "so entered on the fifth of March eighteen hundred and fifty-nine."

Then "the Invoice presented with such Bill of Entry" was *not* accompanied by the declaration required by the Section of the Statute last above quoted, *signed* by the Appellants. And the pretended Oath said to have been made by Craig was no Oath at all; the same being declared to be an *oath or affirmation*, and not having been administered and *signed* by any officer authorized by the 12 Section of the 12 Vic. Ch. 1 to administer such Oath.

The only connection which the Appellants had with the *entry* was through their Book-keeper Clare, who told young Jacques (Jacques, Tracy, & Co's Clerk) in answer to a question put by him, that they might make the Entry as usual, namely *by appraisement*. And it is quite certain that they never had any knowledge of or connection with the *Invoice* which Craig presented at the time he made the Entry.

The circumstances under which the invoice thus presented by Craig came to be made out at 70 cents per gallon, instead of 90 cents, the price really paid by the Appellants for the Oil, as disclosed by Jacques, Tracy & Co's correspondence (commencing with Paper No. 69 of the Record) with the shippers of the Oil and the evidence of the witnesses examined, were shortly these:—All previous consignments of Oil were consigned to Jacques Tracy, & Co.—The first entry was made at 40 cents per gallon, but the Customs appraiser, in consequence of Entries of similar Oil coming from the United States having been made at 90 cents, and thinking himself that the Oil was worth 75 to 80 cents, detained the Oil, and after much parley passed it at 75 cents. Subsequently Jacques, Tracy & Co. arranged with the appraiser that the Oil would in future be passed on an *appraised value* of 70 cents. After this arrangement an entry was made by invoice at that rate (Paper No. 56 of Record,) *which entry, although one by invoice, bears in the corner of it the signature of the customs appraiser*; a circumstance which proves incontestably that this rate of 70 cents was a settled matter between the Customs authorities and these Consignees. Subsequent entries were made at 70 cents by appraisement, but, on the 10th of December 1858, when young Jacques was making a similar entry, the appraiser said that he would not appraise any more, unless an invoice were produced. Young Jacques swears, in relating the interview between him and the appraiser—

"I then asked him, if we produced an invoice at the *appraised value*, would "would it answer?—*He then gave me to understand that it would.* We then "wrote to the Company, stating the fact, and on the fifth day of February, "1859, or thereabouts, we received a lot of 28 packages of the same kind of Oil, and passed it through the Custom House with Mr. Bell's (appraiser's),

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consent, with an invoice at seventy cents." And this is corroborated by the letter itself (Paper No. 77 of the Record) which is produced dated, 5th January, 1859. *Both the Jacques swear also that they never knew what any of the oil cost at the place of shipment.*

It is quite clear therefore, that the Shippers and Jacques, Tracy and Co. both regarded the sending of an invoice *at the appraised value of seventy cents* as a mere matter of form, and that neither of them had any intention of defrauding the customs in using such for the purposes of entry. It is equally certain that Craig who made the entry had no intention to defraud, as he was entirely without knowledge in the matter; and as to the Plaintiffs, the first intimation they had of such an invoice was the *detention* of the oil, when Henry Lyman one of the plaintiffs, made known the fact of their having an invoice at 90 cents to the elder Jacques, who thereupon immediately offered to amend the entry, but was refused by the Respondent permission to do so. Attention is here drawn to the fact that this offer was made on the 7th of March, 1859, namely while the goods were *simply detained* (as stated in Pleas) "*for investigation,*" and *before any seizure thereof, was even pretended to have been made.*

It is said however, by way of impugning the good faith of the Appellants—that they must have known the fact of the payment of duty on an invoice at 70 cents, because the elder Jacques has sworn.—“The first intimation that I am aware of from us to the Plaintiffs respecting the entry was our sending them “the account of disbursements with the permit,”—and because the account (paper No. 65 of the Record) is dated 5th March, 1859, the pretension being, that as this account is made out on the basis of duty having been paid as on 70 cents, and as it was sent “with the permit,” the Appellants had full knowledge of the transaction, but kept quiet. On the supposition that the above statement of Jacques was strictly true, it does not follow that the Appellants knew that an entry had been made by *invoice*. The part of the account having reference to the payment of Duty is in these words and figures,—Duty \$120. 75,—*not a word about any invoice.* Besides, no one could by a mere inspection of this account be notified of the fact that duty was paid on any particular value, it evidently requiring a calculation to be made, based on the exact number of gallons on which the duty was actually paid, to know the fact. And if the Appellants did know, by this account, on what price duty was paid, it wouldn't have concerned them, for both the Jacques and Clare and Alfred Savage (one of the Appellants) all swear that the Appellants always understood that the entries of all previous consignments were *by appraisement*, and that they never knew, until the Oil was detained, that this particular lot was entered in a different form—and Henry Lyman, in the letter, (Paper No. 81 of the Record *filed by the Defendant himself*, asserts the same thing. It is plain, however, that the above statement of the elder Jacques is a mere casual one and not based on any precise knowledge of the facts. By looking at the account, it will be seen, that it is signed by the *younger Jacques*, and he says distinctly that the account *may have been sent in as late as a week after its date*; and Clare, who received it, says, that he is under the impression it was not

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received until after the oil was detained. And it is to be borne in mind, that the Appellants never refunded the amount of this account to Jacques, Tracey & Co.; *the customs authorities being the parties who did so.* Then as to the permit,—Craig swears that *he* was the party who obtained it, and he states his belief to be that he gave it to one of "Jacques Tracy & Co's carters to go and get the oil for the various parties." All natural presumptions are moreover in favour of this view of the matter, for the simple reason, that the Appellant's Oil formed but a small portion of the whole entry, and it is therefore in the last degree probable that the permit would have been handed to the Appellants.

There being no valid *entry* of the oil and no properly signed and attested invoice presented with the Bill of Entry and plainly no intention on the part of any body, much less of the Appellants, to defraud, there could be no *forfeiture* of the oil. And it having been shown that there is no proof that the goods were ever actually *seized* as forfeited, the judgment of the Court below, it is submitted, ought to be reversed.

Pominville, for Respondent:

The first question is, whether under our law an Action is sustainable against a Public Officer acting for the Crown, receiving no fees of office, without alleging and proving malice or bad faith. The Respondent contends that it cannot; as a contrary doctrine involves this absurd consequence, that the Crown virtually can be sued, by directing the suit against one of its officers.

Chap. 101, Cons. Sta. L. C., sec. 8, enacts:—"The privileges and protection given by this Act, shall be given to such Justice, *Officer, or other person acting as aforesaid*, only, and to no other person or persons whatever, and any such Justice, Officers and other persons acting as aforesaid, *shall* be entitled to such protection and privileges in all cases where he has acted *bona fide* in the execution of his duty, although in such act done he has exceeded his powers or jurisdiction and has acted clearly contrary to law." This Statute places the Defendant exactly in the same position as a Justice of the Peace; the preamble showing clearly that but one set of rules should obtain for the Magistrate as well as all other Public Officers, without making any exception. Under the operation of our Statute, the liability of a Public Officer and his exemption from it would be the same as if he were a Justice of the Peace; and the rules and decisions applicable to an action against the latter, apply with equal force to an action against a Public Officer.

The decisions are numerous as establishing the doctrine laid down in 1 Taylor, 298—"Statutes of this kind are intended for the protection of honest persons who *bona fide* mean to discharge their duty; and the Court will consequently so interpret their provisions, as to save harmless all persons who act *illegally under the reasonable belief that they are authorized* in what they do by Act of Parliament; and this too, whether the error complained of has been committed in respect of time, place, or circumstance."

In *Beechy vs. Sides*, 9 B. & C., p. 809, Lord Tenterden, C. J., said—"We have nothing to do with the policy of the law, but are only to give a construc-

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tion to the clause of the Act of Parliament in conformity to the construction given to similar clauses in other Acts of Parliaments. It has uniformly been held that where a party *bona fide* believes or supposes he is acting in pursuance of an Act of Parliament, he is within the protection of such a clause." Same doctrine held in *Ballinger vs. Farris*, 1 M & W. p. 630; and *Hughes vs. Buckland and others*, 15, M. & W. 352.

Lord Brougham is reported to have laid down this principle—"Even inferior Courts, provided the law has clothed them with judicial functions, are not answerable for errors in judgment; and where they may not act as Judges, but only have a discretion confided to them, an erroneous exercise of that discretion however plain the miscarriage may be, and however injurious its consequences THEY SHALL NOT ANSWER FOR. This follows from the very nature of the thing. It is implied in the nature of judicial authority, and in the nature of discretion, where there is no such judicial authority." Broom's Legal Maxims p. 95.

It was in confirmation of this well-established rule that the present Imperial Act 11 and 12 Vict. ch. 44, enacted by section 1,—“For an act done by a Justice of the Peace, within his jurisdiction, the action shall be an action on the case, wherein it must be alleged and proved that the act was done maliciously, and without reasonable and probable cause.” This rule of protection is clearly extended by the Chap. 101 of our Statutes to all Public Officers.

The second question is one equally important. It applies to that portion of the declaration which alleges the offer to make entry and tender of duty by Plaintiffs; and likewise to the proof on that point, which is insufficient to establish that the formalities of law had been complied with by plaintiffs. The Action rests upon the alleged offer and tender of the 12th and 14th April, and Defendants' refusal to comply. This refusal being alleged to be the illegal act complained of, is the chief point to be determined, as Plaintiffs could have no recourse unless they complied with the conditions precedent imposed upon them by the law.

The Customs Act, Chap. 17, Consolidated Statutes of Canada, sec. 25, declares “No entry shall be deemed perfect unless a sufficient Invoice of the goods “to be entered, attested as hereinafter required, shall have been produced to the “Collector.”

It is not alleged in the declaration that the original invoice was produced, nor is there any evidence that it was. The protest makes mention of an invoice, but no copy is attached, no extrinsic evidence offered of the fact. The identity of the invoice, Plaintiff's Exhibit No. 1, is not proved, so as to establish that it was the same as that mentioned by the Notary. This invoice moreover, if the same, is not signed by any of the Plaintiffs or by any person on their behalf as the law requires (see sec. 26, same chap.) Under such circumstances the Plaintiffs do not establish a compliance on their part with the formalities of law, so as to constitute the alleged refusal an illegal act, for which the Defendant should be held responsible. It is evident that Plaintiffs would have no action under any circumstances against the Collector, without shewing a strict conformance on their part, to the requirements of the law.

The third question is one which admits of no doubt, viz: That the Plaintiff's remedy, if any, was against the Oil Works Company, exporters of the Oil, who by their fraudulent act of sending a false invoice to their Agents for the purpose of passing entry thereon, defeated the delivery of the Oil to Plaintiffs; who not having received all the Oil they purchased, would have, if not chargeable directly with being the authors of the fraud, a remedy against the exporters.

The next question in point of importance is whether a seizure of the Oil was made; in what manner the law contemplates it should be made: and if the owner should have notice of the seizure and of the reasons or cause of seizure.

The Defendant contends that whatever apparent defect might exist in the law, when discussed upon principles of convenience or policy, that defect can only be supplied by the legislature, and that in this Action (being one of damages,) it is incumbent on Plaintiffs to shew *that some expressed requirement of the law had not been complied with*. The law declares how the seizure is effected, viz: by detention and removal to the warehouse or place selected for safe keeping of goods seized as forfeited. The 65th sec. same chap. enacts—"That if any goods, &c., subject or liable to forfeiture, are *stopped or taken* by any Police Officer, or any person duly authorized, such goods shall be carried to the Custom House, &c., or place appointed, &c." The word "seized" used in the 80th sect., relied on by Plaintiffs, does not import as they contend that a formal seizure, as under civil process, should be made; but the meaning is sufficiently explained in the same section, by the additional word "aforesaid" referring to the words "stopped or taken" in the 65th sect.; then, again, the 80th sect. says "unless the persons *from* whom they were seized or the owners thereof, shall within one calendar month, &c." The 84th sect. enacts "That if any goods shall be seized for non-payment of duty or any other cause of forfeiture, &c., the burden of proof shall lie on the owner or claimant of such goods, and not on the Officer who shall seize *and stop the same*." The 81st sect. makes use of these words—"That in case of the seizure of any cattle, horse, or animal, or of any perishable article, it shall be lawful for the Collector of the port at which the same *shall have been secured as aforesaid*."

The words "stopped," "taken," "secured," "carried," all used in these various sections show that the legislature has constituted the doing of these acts by the Officer having authority so to do the "seizure" and in that connection, has imposed upon the person *from* whom they were taken or the owner, the necessity of giving notice; and in the terms of the 84th section imposes on the owner or claimant the burden of proof whether "the duties have been paid on such goods," or "whether any other thing has been done by which such forfeiture would be prevented."

The law does not require that notice should be given to the owner or person claiming the goods of such detention or seizure, or the cause thereof, except when a formal notice of intention to claim the goods has been given, as provided by the 80th sect.; and in that case the Attorney General, on behalf of the Crown, gives notice by posting up an Information in the manner pointed out by the 78th and 79th sect., disclosing the grounds of contravention and the causes

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of forfeiture. This serves to explain the practice of forwarding to Government the seizing report mentioned in the evidence of the witness Maçon.

This 65th sect. of our statute was copied from the Imperial Act, 6 George IV., ch. 107, 112, "If any goods, subject or liable to forfeiture under the Customs laws, shall be *stopped or taken* by any Police Officer or other person acting by virtue of any Act of Parliament, or otherwise duly authorized, such goods shall be carried to the Customs, &c."

The Appellants cannot even raise as an equitable consideration of their case, that they were not aware that the Oil was seized or the cause thereof; there is no such issue raised by the pleadings on the contrary while admitting in their special answer that they made no formal claim, as required by the Statute, they attempt to excuse it, or to account for that omission, by alleging that they were misled by the Commissioner of Customs whom they had petitioned on the subject.

The evidence establishing knowledge on their part is conclusive :—

1stly.—ALFRED SAVAGE, (one of the Plaintiffs) swears that they became aware of this fact on the 8th March, and that the cause was the undervaluation of the Oil.

2ndly.—Wm. H. CLARE, (Plaintiff's bookkeeper) swears 9 packages were delivered, and the remainder detained.

3rdly.—GEO. E. JACQUES' evidence is to the same effect, and that when he offered to make a new entry the Oil had been detained.

4thly.—The letter "P" addressed by Plaintiffs to Benj. Lyman also establishes their knowledge. It concludes by saying that "the Inspector General should allow Jacques, Tracy & Co. to amend their entry and *liberate the goods.*" This letter is dated 8th March, 1859.

5thly.—Letter of Jacques, Tracy & Co. to Spurr, Manager of the Oil Works Co., dated 9th March, 1859, commences—"We are sorry to inform you that the lot of 85 casks of Albertine Oil, *has been seized by the Custom House, owing to their discovering, after we had made the entry and paid duty at 70 cents on the Invoice sent us, that Lyman, Savage & Co. had an Invoice for their lot at 90 cents.*"

The Respondent respectfully submits that in the absence of any positive rule of law requiring a written notice to be given, there is abundant evidence to establish that all parties interested had notice that the Oil was seized and the cause of seizure; and the omission to give the formal notice of intention to claim required by the Statute, cannot be excused upon any legal ground which the Court could recognize, more especially as the condemnation is by positive enactment of the Statute pronounced in favor of the Crown as resulting from such omission.

The other points urged at the argument will not require any lengthy notice, and may be enumerated in the following order :—

1st.—That Jacques, Tracy & Co. were not the consignees and had no authority to pass the entry.

2nd. That if they were authorized to pass entry, it was an authority to do so in a particular way, viz : by appraisement and in no other way.

3rd.—That although Jacques, Tracy & Co. may have been their Agents, Craig was not.

4th.—That the entry made by Craig was no entry at all; that there was no regular oath administered, and that Crispo had no authority to administer it.

5th.—That *an intent to defraud* is necessary to operate a forfeiture under the Statute, and that no such intent is proved.

6th.—That Jacques, Tracy & Co. committed no intentional fraud, and even, if they had, that the Plaintiffs had no knowledge of it, and could not be legally responsible for their acts.

The Respondent, in answer to these several objections, urged:—

1st. That there is sufficient to shew that Jacques, Tracy & Co. were the consignees. It is admitted at any rate that they were the consignees of all previous importations of Oil, and instead of any change being established in the mode of transmission of the Oil in question, the evidence establishes that it was sent as before to them; the original advice note from the Grand Trunk Co. was sent to them—the Invoice, Defs. Ex. No. 1, was sent to them for the purpose of passing entry at the Customs. These were produced at the Customs, sufficient by law, to oblige the Custom Officials to recognize Jacques, Tracy & Co., as the party entitled to pass entry; and although Plaintiffs produce a Bill of Lading, another Bill of Lading, as well as a second invoice, may have been sent to them. This Oil came with a larger quantity consigned to them for other parties. The letter E produced by Alfred Savage, as the one inclosing their invoice of this Oil, says, "and would suggest whether it would not be advisable for you to entrust them (Rhynas and Starr) with the bonding and forwarding of your parcel, and whether you would wish them to include this with other Oil under same bond, and invoice for duty, to Messrs. Jacques, Tracy & Co." This serves to explain how the Oil in question came direct to Jacques, Tracy & Co." Moreover the Plaintiffs took delivery of the Oil from Jacques, Tracy & Co., as established in evidence. Wm. H. Clare on cross-examination says, "I think the permit so left at the Plaintiffs' office came from Jacques, Tracy & Co., and the Oil delivered in the same way as on previous occasions." G. E. Jacques when asked if the Oil previously imported was consigned to the firm, says, "I cannot state from memory, but my conviction is that it was forwarded to us for distribution in the same way as is mentioned in Defendant's Exhibit No. 1;" and Thomas Craig swears "the Oil was consigned to Jacques, Tracy & Co., and the first knowledge I derived of the subject was the receipt of the notices and invoice." With such circumstances in evidence, coupled with the fact that Jacques, Tracy & Co. paid the freight on said Oil and charged it in their advice note to Plaintiffs (document P), sent with the permit, it is impossible to adopt the view of the Plaintiffs' Counsel on this point; for it would be necessary to shew that if Plaintiffs intended to rely on the fact that they were consignees and owners and alone entitled to pass entry, they should have at once repudiated the act of Jacques, Tracy & Co., and have offered to make a new entry upon the correct Invoice in their possession, instead of adopting their act and taking possession of 9 packages of said Oil.

2ndly. That Jacques, Tracy & Co. had their authority, as well as that of the

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manufacturers, to pass entry at the Customs is fully established in evidence. Alfred Savage in his sworn examination before Mr. Bell, (document F) says, "but some time ago we were notified by Messrs. Jacques, Tracy & Co., of its being on the way when we consented to their acting as Agents and entering at the Custom House as formerly." In letter "P" to Benjamin Lyman, the Plaintiffs write, "subsequently, J. T. & Co proposed to continue to act for us in receiving and entering the oil, as they were employed by the New Brunswick Co. to do so for that shipped to Western Canada, to which we acceded." The verbal testimony is to the same effect:—G. E. Jacques, on cross examination, "with reference to all the Oil that came from the Company we acted as forwarders, and as such, were the agents of the Company as regarded the distribution of the Oil. We never received any kind of remuneration from the Company. The only charge we were in the habit of making with respect to the Oil was made to the parties for whom the oil was intended, and consisted of a brokerage for entering at the Custom House here, and any actual disbursements and carrying charges for that which went to Upper Canada." The Plaintiffs attempt to qualify this authority by saying that Jacques, Tracy & Co. were to pass entry as before, viz: by appraisement. This, instead of bettering their position only makes it worse, as they knew that previous appraisements were at a valuation less than the real invoice price, which invoice they had in their possession, and less also than their previous invoice prices, and consequently was a direct violation of the law, and a gross fraud authorized by them, as they well knew that no entry by appraisement could legally be made where an original invoice could be produced, and which they had and were bound to produce.

3rdly.—The pretension that if Jaques, Tracy & Co. were their Agents, Craig was not, is a futile objection. They knew that the firm passed their entries by one of their clerks, and consequently the authority conveyed was full and ample to effect that object in the ordinary course of their business, and knowing also that Jaques, Tracy & Co., as agents of the manufacturers received the goods direct from them, before delivery was made to the importers. The Plaintiff's witness, G. E. Jacques says, "I have no knowledge of the fact that the Plaintiffs knew the Oil in question was forwarded to us, but I presume they did know it." Moreover, the entry (document M) is an entry of previous lot of Oil, made by a clerk, W. J. Jacques, and bears the signature of Lyman, Savage & Co., establishing that they took part in, and assented to, such entry so made through the clerk, and to his swearing on the back of such entry that he was duly authorized to enter the said Oil, and (unfortunately for Plaintiffs) to his including in that oath that nothing had been on his part or by any other person to his knowledge concealed or suppressed, whereby Her Majesty might be defrauded of any part of the duty lawfully due. That entry signed by Plaintiffs was at 70 cts.—they did not take this oath, but they allowed Jacques, Tracy & Co's clerk to swear, what they knew was untrue, as they had then in their possession an invoice of that Oil at a higher rate. This suffices to show their assent to the mode adopted by Jacques, Tracy & Co., of effecting entry by their clerk.

This objection moreover is of no avail. The law requiring that the Agent or Attorney should produce written authority was complied with—the power of

Attorney to Craig, from Jacques, Tracy & Co. is produced and proved; Jacques Tracy & Co. were the persons to whom the Oil was forwarded for entry at Customs and for distribution, and they produced Advice Note from Grand Trunk Company, and invoice to the Customs Department. Apart from this, the objection is not available to Plaintiffs, they adopted and sanctioned all that had been done, by taking the permit and delivery of the Oil, from Jacques, Tracy & Co., and taking possession of part of it. This requirement of the law was to prevent frauds, not to facilitate a party who has acquiesced in and benefited by a fraud practised from avoiding the consequences of it, even supposing that no written authority to Craig had been produced or proved.

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4thly.—The authority of Mr. Crispo to administer the oath is derived from the Act regulating the general management of the Customs, 8 Vict., ch. 4, sec. 14, which confers this power on the "Collector or Chief Officer of Customs," or "persons acting for them respectively." This is not repealed by the 12th section of 12th Vict., ch. 1, relied on by Plaintiffs' Counsel, as it was passed with a view to extend the provisions of the former Act. But the proviso to this clause empowers the Governor in Council to appoint other persons to administer the oath. The Defendants were not bound to prove Mr. Crispo's appointment; it is sufficient in law to shew that the Public Officer is in the habit of administering oaths, and his authority will be presumed.

1 Taylor on Ev: p. 155, lays down that rule and says—"This rule has been expressly adopted by the legislature in the Statutes relating to the Excise and Customs, and at Common law it has been held applicable to (here follows a lengthy enumeration of Public Officers, and concludes by saying) and indeed *it extends to all Public Officers.*" It is one which prevails in Criminal Courts on trials for perjury. Moreover the taking of the oath is not essential. The forfeiture operates by the simple fact that in the invoice the goods were undervalued.—18 sec., 12 Vict. ch. 1.

5thly.—The Plaintiffs' Counsel urged that the law requires that there should be an *intent to defraud*, and that none was proved. As to the proof, the Defendant refers to the remarks hereafter made to the 6th objection. It is sufficient here to say, that the intent is presumed from the unlawful act. It is a principle of law obtaining in all Courts, civil as well as criminal, and more frequently acted upon in the latter, that a person is presumed in law to intend the natural consequences of the act done.

1 Taylor on Ev: p. 92—"The presumption that a party intends the natural consequences of his acts, is not confined to criminal matters, but extends equally to his civil responsibilities."

6thly.—It was also urged that Jacques, Tracy & Co. committed no intentional fraud; and even if they had that the Plaintiffs had no knowledge of it, and could not be legally responsible for their acts.

The answer to that is, 1stly.—That the evidence conclusively establishes that they intentionally committed a fraud; 2ndly.—That Plaintiffs knew that on previous occasions as well as on that, they were defrauding the revenue; 3rdly.—That whether they knew it or not, they adopted their act and benefited by the

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fraud by taking possession of a part of the goods, and in the act of taking the remainder, and hence legally responsible.

1st.—That Jacques, Tracy & Co. intentionally committed a fraud not only in entering the Oil in question, but in all previous entries made by them, is shewn by the following facts in evidence and which renders comment unnecessary:—

THOMAS CRAIG, says—"After this, Mr. Bell, the appraiser, told me that for the future I must bring a correct invoice with a rate higher than forty cents. I do not recollect when he told me this, but it was between August, fifty-eight and March, fifty-nine. I now recollect that he told me this on an occasion when I wished to make entry of other packages of similar Oil. I produced an Invoice for the purpose of passing entry of the same, and he then told me that he would not appraise the Oil any more, and that I would have to produce a correct invoice."

G. E. JACQUES, (firm J. T. & Co.,) examined by Plaintiffs, says—"On or about the 10th December, 1858, our clerk was informed that in future an Invoice must be produced. On advising the shippers of this, and considering it as a matter of form that the requirements of the Custom House might be met, and supposing that the Company had no fixed value for their Oil at the place of shipment; we intimated that as the Oil had been appraised here at seventy cents that that might be considered as the invoice price, and that by complying with the request of the Customs they would save further trouble." * * * The Company acted on this suggestion, and sent a lot of 28 packages, with an Invoice at 70 cents, which was entered on or about the 5th February, 1859. The next and last shipment was the one in question."

N.B.—The alleged supposition that the Company had no fixed value, is absurd.

He knew this Oil was to supply purchasers' orders, and that there must have been a price higher than 70 cents, otherwise he would never have suggested the sending of an Invoice at 70 cents for the purpose of passing entry at Customs. Moreover Craig swears that what Mr. Bell wanted was the production of a correct invoice.

JACQUES, TRACY & Co's LETTER, dated 25th August, 1858, written to the Company, shews Mr. Jacques was mistaken in his evidence as to the date, 10th December, 1858, and that he knew that the Customs authorities here, as far back as August, 1858, required an invoice at the selling price. After saying that they paid duty "at the rate of 40 cents as per your invoice," and that two casks had been detained until additional duty was paid, they add, "we called on the Collector this morning but could not shake his purpose in exacting the duty at the selling price at your works."

LETTER, 31st AUGUST, 1858.—"Since we had this pleasure on the 25th, we have waited on the Commissioner of Customs, relative to the duty on your Albertine, and regret to say that he sustains the opinion of our Collector, and that the Oil must be entered for duty at the selling price at the works, and not at the manufacturing costs; both the Commissioner and Collector say that the law is so plain on this point that the Government cannot vary from it."

LETTER, 6th NOVEMBER, 1858,—Repeats the same thing, that they could not induce the Collector to change his views; refers to their sending an invoice to LYMAN, Savage & Co., at 55 cents, which Mr. Savage shewed to them, and concludes with this warning, "*but above all things you must avoid sending two invoices of the same lot, which, if discovered by the Custom House people, will lead to serious trouble.*"

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LETTER, 5th JANUARY, 1859,—“On paying the duty on this lot, the Appraiser objected to passing it without an Invoice, and said he would not pass any more; 70 cents is as you are aware the value fixed on it. We suppose there cannot be any difficulty in the way of your sending an Invoice at this rate, by each lot to our address.”

LETTER, 9th MARCH, 1859.—“We are sorry to inform you that the lot of 85 casks of Albertine Oil have been seized by the Custom House, owing to their discovering after we had made the entry and paid duty at 70 cents on the invoice sent us, that Lyman, Savage & Co. had an Invoice of this lot at 90 cents.”

G. E. JACQUES, when examined as Defendant's witness, swears first that Plaintiffs never showed him any of their invoices; but when his attention was called to his letter of 6th November, 1858, he was obliged to admit that Plaintiff did show him an invoice at 55 cents. The tenor of that letter establishes that he knew it was a false invoice, and his letter of 5th January, 1859, proves that he must have known that Plaintiffs were paying more than 70 cents, as he never would have suggested as he did by that letter, the forwarding of an Invoice at the appraised value of 70 cents, considering also that in his previous letters he admitted his failure to change the decision of the Collector and Commissioner that the duty to be paid must be “on the selling price at the works.”

2ndly.—That Plaintiffs knew that on previous occasions as well as on the one in question, they were defrauding the revenue, is also abundantly proved.

ALFRED SAVAGE, on his examination upon *subpœna duces tecum*, produces 4 invoices,—

Invoice A, 12 Aug., 1858, at 80 cents, entered on Invoice at 40 cents.

“ B, 10 Nov., 1858, at 76 “

“ C, 4 Dec., 1858, at 85 “ entered at 70 cents.

“ D, 11 Dec., 1858, at 85 “ entered at 70 cents.

The whole of his evidence is very important; but Defendant will merely call attention to the fact that he admits that all these invoices were received prior to the arrival of the Oil; and that the invoice, Plaintiffs' Exhibit No. 1, was received about the 3rd February, 1859. He says, “*Messieurs Jacques, Tracy & Co. of Montreal were permitted to make entries of the Oil mentioned in the said invoices, (A. B. C. and D.) by appraisement on our account.*” * * * “We never delivered to Jacques, Tracey & Co. the original invoices we received from the New Brunswick Oil Works Company for the purpose of making entry at the customs. These invoices generally reached us before the arrival of the Oil in question.” * * * “Where invoices exist, entry at the Customs is generally made by the production of the invoice; this, however, is not always the case. The goods imported by us were entered at the Customs upon the

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invoices we received. The exception I have reference to, when I say that entry is not always made on invoices, is when new goods or articles are imported which have no fixed commercial value here."

G. E. JACQUES substantiates truth of contents of letter 6th Nov., 1858, in which it is stated: "The last 5 brls. for Lymans, Savage & Co., was entered at this rate: they shewed us your invoice at 55 cents, but they did not deem it advisable to incur the risk of seizure, which they would were they to enter it at that price; they desired us to enter the lot, which we did at the price named, viz: 70 cents, this rate is 6 cents less than Quebec or Hamilton." The Court will please notice that this extract is taken "from Paper, No. 8," filed on the examination of Mr. Jacques, and not from what purports to be a copy of the same letter, forming part of documents marked "No. 301 B," filed 22nd November, 1860, admitted to be the documents referred to in Mr. Jacques' deposition as those delivered by him to Mr. Bouchette, Commissioner of Customs, as the latter omits some material parts of the former, and particularly the allusion to the Plaintiffs' showing them the invoice of 55 cents. This omission shews a clear intention, on the part of Mr. Jacques, to conceal the truth and to deceive the Government by producing false copies of his correspondence.

The Defendant submits that in the facts above referred to, there is conclusive evidence of Plaintiffs' knowledge of the fraud, and their participation in it. The excuse given by Mr. Savage that goods having no fixed mercantile value here are sometimes entered by appraisement, is futile, 1stly, It is not the value here, but its value at the place of exportation upon which the duty was payable. 2ndly, The fact was not as he assumes that the Oil had no mercantile value here, for he has proved by two or three witnesses that its mercantile value here was 7s. per gallon. But it is urged by Plaintiffs' Counsel that it was agreed and understood that the appraised value of 70 cents should be the basis upon which entry should be made for payment of duty. This the Defendant denies. Craig's evidence and the extracts above given from Mr. Jaques' letters prove the reverse—that although some entries were made by appraisement (the true invoices being suppressed) Mr. Bell positively refused to make any further entries in that form. Mr. Jacques suggests the sending of invoices at 70 cents; the Company adopts his suggestion. Surely the Court can never sanction such a pretension that because the Plaintiffs purposely suppressed their invoices and induced the Custom House Officer to enter by appraisement at 70 cents, as shown by their participation in the entry document M, that having thus accomplished one fraud by deceiving the Officer of Customs, they were justified in carrying out the fraud by authorizing Jaques, Tracey & Co., to enter the Oil in question by appraisement as before. The fact of a false invoice at 70 cents being produced for the purpose of such entry made no difference; the result was the same and the fraud equally as great, whether entered by appraisement at 70 cents, or upon an invoice at that price.

3rdly.—Whether Plaintiffs knew of the fraud or not, they adopted the acts of Jacques, Tracey & Co., and benefited by the fraud by taking possession of a portion of the Oil, and consequently are legally responsible.

It is established in evidence, that with the permit a notice was sent in the

form of document "P" by Jacques, Tracey & Co., to the Plaintiffs. This notice informed Plaintiffs what amount of duty had been paid, viz: an amount less than that which they admit in their alleged tender should have been paid, and by acting on this permit and obtaining possession of a portion of the Oil, they unquestionably adopted the act of Jacques, Tracey & Co. The fact that this notice was sent to them with the permit is proved. This notice is dated 5th March, 1859. W. J. Jacques, says, "We of course afterwards made out our account advising Lyman, Savage & Co. of the payment of the duty and freight. This was done as on all former occasions. I could not say how soon the account was sent in, after the entry was made; *it may have been the same day*; it may have been a week after, but it cannot have been long after.

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MONDELET, J. (*dissentiens*.) After giving this case a good deal of attention, I have come to the conclusion, that the judgment appealed from should be reversed, for, amongst other reasons, the following:

I. The collector by law, has no right to take entries of any goods or articles, but from the owner, the importer, or the consignee, unless the person offering to make entry has a power of attorney, or rather in the terms of the law, "authorized by a written instrument which he shall deliver to and leave with the Collector (12th Vict. C. 1. §§ 8 & 23.) The present case is one which the law does not cover; the entry made by the Collector is, consequently, a nullity.

II. The entry made by Thomas Craig, being unauthorized, is evidently of no avail, a nullity, and a proceeding which the Collector could not validly act upon.

III. There is no evidence that the Appellants ever authorized Jacques, Tracey & Co. to make any other entry but upon appraisement: it follows that there was no guilt, fraud or wrong whatever on the part of the Appellants in the proceeding here in question.

IV. The pretended seizure by the Collector or his subagents, is not proved. The paper referred to by Maçon, of the 7th, or rather without a date, but which he says, was handed to him on the 7th March, has no bearing upon a seizure which is pretended to have been made on the 8th. And even as to that, Mr. Jordan speaks from notes in the Office, as to a seizure made or mentioned as having been made by another person: this is no evidence.

V. The Collector, if he ever made a seizure, was bound by 10th & 11th Vict. c. 31, § 51, 52 & 58, to have the goods and articles condemned upon information, in a Court of Justice.

VI. In the absence, total absence of evidence as to the day of seizure, there is no legal way to determine the commencement, running and end of the 30 days, within which Appellants could claim these goods and articles.

VII. The Appellants are to be judged for this present case; therefore, it is neither right, nor legal, to draw from circumstances foreign to the present issue, inferences prejudicial to their interest in the case now under consideration.

VIII. There is no evidence whatever of fraud, or of the remotest intention of committing any, on the part of the Appellants, nor of violating the law. The evidence as to Jacques, Tracey & Co. being authorized to make entries by appraisement, can not be divided; it must be taken as given and we have no right to twist

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that evidence into one of a general authorization to make, on the part of the Appellants, entries of any and whatever description. There was an obvious reason for making such entries by appraisalment. The oil in question, was an experiment which no known value had, as yet, been set upon, so that in the present, as in former cases, where Mr. Bell had made such appraisements, it was quite natural that the same course should be followed.

MEREDITH, J.—(*For the majority of the Court.*) The Appellants in the month of January, 1859, purchased 19 barrels and four casks of Albertine oil at 90 cents per gallon from the New Brunswick Oil Company.

The sellers, who carry on this business at St. John, New Brunswick, sent to the Appellants an invoice in which the oil was charged at its true price, but they at the same time sent another invoice to Messrs. Jacques, Tracey & Co., of this city, in which the 23 packages of oil intended for the Plaintiffs, together with 62 other packages, were charged at 70 cents per gallon, instead of at the true price 90 cents per gallon, and upon this false invoice, the whole of the 85 packages were entered at the Custom House by Jacques, Tracey & Co.

Our law declares in effect "that if, in any invoice or entry, any goods shall "have been undervalued for the purpose of avoiding the payment of the duty, "or of any part of the duty, on such goods"—all the packages and goods included, or intended to be included, or which ought to have been included, in such invoice or entry shall be forfeited." 12 Vic. c. 1. § 18. C. S. C. p. 228.

In this case the undervaluation is certain, and indeed is not denied, and it is equally certain, as a maxim of law, that every person must be taken to intend that which is the immediate and necessary consequence of his deliberate acts.

In this case the only object to be attained by the undervaluation of the oil, in the invoice, and entry, at the customs, was the "avoiding of the payment of a part of the duty;" and that the oil, was so undervalued, for that purpose, is, it seems to me, beyond the possibility of reasonable doubt.

According to this view of the case, the point to be considered by us is, as to whether Jacques, Tracey & Co., in entering the oil did so with the knowledge and consent of the Appellants, so as to make the oil belonging to them subject to forfeiture.

The Appellants in the course of the preceding autumn and winter, had imported oil from the same manufactory at four different times.

On all those occasions the oil was entered at the Custom house by Jacques, Tracey & Co.; in each of the four entries, the oil was undervalued; and in no instance did the Appellants place in the hand of Jacques, Tracey & Co., the invoice which the Appellants had in their own possession showing the true cost of the oil.

That the Appellants were aware of the rate at which their oil had been entered for duty on these several occasions is beyond doubt; for they are proved to have refunded to Jacques, Tracey & Co. the amount of the duties which they had paid at undervaluation as already mentioned.

Thus far, as regards the previous acts of the parties. As to the importation in question, we find that the Appellants were notified of the shipment of the oil by a letter dated the 29th January, 1859, from the manufacturers, in which

Messrs. Jacques, Tracey & Co., are alluded to in connection with the payment of the duties.

Mr. W. H. Clare, (at that time a bookkeeper in the employ of the Appellants) says:—

"A few days before the arrival of the oil in question in this cause, some one called at the office of the Plaintiffs, I think a Mr. Craig, a clerk of Jacques, Tracey & Co., who informed me that a parcel of oil was on the way for the Plaintiffs and others, and asked if he should enter the oil with that for the other parties. I told him he might do so; of course meaning that he should enter it as formerly, by appraisement. I did not in any way mention this interview to the Plaintiffs or any of them until after the seizure."

On the arrival of the oil it was entered by Jacques, Tracey & Co., who in the usual course of business obtained from the Custom House the order for the delivery of it, which they gave to the Appellants; and the latter, having orders on hand for part of the oil, at once sent for and obtained nine barrels of it, and afterwards refunded to Jacques, Tracey & Co., the amount which they had paid as duty on the oil, at the undervaluation, already mentioned of 20 cents per gallon.

The Appellants thus, in the most unequivocal manner, adopted the act of Jacques, Tracey & Co., and if there were no other evidence in the record than that to which I have alluded I think it would have been sufficient to have justified the Court in holding that Jacques, Tracey & Co., in entering the oil at the Custom House did so with the knowledge and consent of the Appellants. In addition to this however we have the statement of Mr. Alfred Savage, one of the Respondents, who, in answer to the question—"were you aware of the lot of oil purchased by 'you having been entered by Jacques, Tracey & Co.,' has answered 'we were not aware that it had even arrived, and did not know of its having been entered until the order for delivery was brought into our office;'" he however adds this very important statement "but some time ago we were notified by Messrs. Jacques, Tracey & Co., of its being on the way; *when we consented to their acting as agents and entering at the Custom House as formerly.*"

It is therefore plain that the oil in question was entered at the Custom House by Jacques, Tracey & Co., with the knowledge and consent of the Appellants; that when it was so entered it was undervalued in order to avoid a payment of part of the duties, and that the Appellants were aware it was to be so undervalued. As to the last point there cannot, I think, be any doubt when it is recollected that the previous importations had been undervalued by Jacques, Tracey & Co., as agents for the Appellants, and that, they being aware of this, consented, with respect to the oil in question, that the same Jacques, Tracey & Co. should act as their agents, and enter the oil at the Customs *as formerly.*

The explanation of the Appellants as to the undervaluation of the oil is that they understood from Jacques, Tracey & Co., that they had come to an arrangement with the Customs to enter the oil by appraisement.

The answer to this explanation is, that according to provisions of our law, which the Appellants either knew, or were bound to know, the entry of the oil by *appraisement* under the circumstances of this case, was impossible.

The law expressly declares what shall be the value of goods as regards the

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payment of duty; and requires that with the entry there shall be produced an invoice of the goods attested under oath.* In the present case a genuine invoice of the goods had been sent to the Appellants, and was in their possession at the time the entry was made; and if that invoice had been produced, as it ought to have been, no officer of the Customs, even if so disposed, could have caused a valid entry to be made by appraisement, under the invoice value. †

There is not however any ground whatever for supposing that the Custom House authorities ever gave Jacques, Tracey & Co., any reason to believe that the casks of oil which afterwards were seized could be entered by appraisement.

Mr. George E. Jacques in his deposition says: that on or about the 10th of December, 1858, our clerk was informed that in future an invoice must be produced. It appears from the statement of the clerk that an attempt had been made to enter a lot of the same oil at 40 cents per gallon, that being a little more than half its value, and that he was then told that he would have to produce not merely an invoice, for that had been already been done, but a "correct invoice."

This must have occurred, not as Mr. Jacques says in Dec., but, in August, or at least his firm were aware in August of the views of the Custom House authorities on this subject; for in the letter of Jacques, Tracey & Co., dated the 28th of August, and written to the manufacturers they say "we called on the collector for this morning, but could not shake his purpose in exacting the duty *at the selling price at your works.*"

And in their letter of the 31st of August they say "since we had this pleasure on the 25th we have waited on the Commissioner of Customs, relative to the duty on your Albertine, and regret to say that he sustains the opinion of our Collector, and that the oil must be entered for duty *at the selling price at the works*, and not at the manufacturing costs,—Both the Commissioner and the Collector say that the law is so plain on this point that the government cannot vary from it."

And yet, notwithstanding these statements, Mr. George E. Jacques in his deposition in this cause has said he considered the demand of the Custom House for the production of an invoice a "*matter of form*," and although the manufacturers had sent forward false invoices in order that the Oil might be undervalued at the Custom House, he has sworn "I believe that the Oil Company had no intention whatever to defraud the Revenue, but were acting in good faith as we were."

It is needless, however, to dwell upon this part of the case, because the entry itself shows that there was no consent that it should be made by appraisement. On the contrary it was made by invoice; not however by the true invoice, but by a spurious one forwarded by the sellers for that purpose.

As I view the case, the important facts against the Appellants are 1st., that they, knowing that the same Oil had previously been undervalued for them by

* 12 Vic. c. 6, 2. § 6. 12 Vic. c. 1. § 7, 8. C. S. C. p. 223.

† For the law expressly declares "that the value of any goods for duty, shall never be appraised at less than the value for duty as it would appear by the invoice and Bill of Entry. C. S. C. p. 226, chap. 17. sec. 33. clause 4.

Jacques, Tracey & Co., at the Customs, empowered that firm to enter the Oil in question, in the way they had previously done with respect to the other oil. 2dly., That although they empowered Jacques Tracey & Co., to make the entry in question, they withheld from them the genuine invoice, that being the only paper by means of which a right entry could have been made. And 3dly, after the entry was made they adopted the act of their Agents, took a part of the goods entered, and refunded the amount paid as duty according to the undervaluation.

Under these circumstances it seems to me that the Appellants are bound by the entry of their Agents in the the same way as if it had been made by themselves in person.

I do not wish to be understood as saying that the Appellants are proved to be morally guilty of having committed a fraud against the revenue laws. They may have understood, as Mr. Savage says they did, that their Agents had come to an arrangement with the Customs to enter the Oil by appraisement. And they may have supposed that in this case, such an arrangement could have been made. If they entertained such an opinion they were under an error of law; but an error of law cannot relieve them from the consequences of the act of their agent which they authorized and ratified. The Appellants knew all the material facts; those facts upon the face of them disclosed what was fraud in a legal point of view; and for the consequences of that fraud, in law, they must to the extent of the judgment of the Court below be held liable.

I do not fail to bear in mind that it is contended the entry is null not having been made by the "owner," "consignee" or importer or an attorney duly authorized.

With respect to this pretension it may be observed that by the invoice sent to Jacques, Tracey & Co., by the shippers, and upon which the goods in question were entered at the Custom House, Jacques, Tracey & Co., appeared to be the consignees, at Montreal, of the goods. The heading of that invoice is as follows: "85 packages Albertine Oil shipped by the New Brunswick Oil Works Co., on board the schooner Pearl for Portland consigned to Rhynas, Starr & Co., to be forwarded by Grand Trunk Railway Company to Messrs Jacques, Tracey & Co., for account and subject to order of shippers." Under this invoice, upon the face of which Jacques, Tracy & Co., appeared to be the consignees, at Montreal, of the goods, the entry in question was made at the Custom House, with the knowledge and consent of the Appellants; who therefore cannot now be allowed to say that Jacques, Tracey & Co. were not the consignees of the goods.

A Judgment maintaining the doctrine contended for by the Appellants would be, in effect, an invitation to frauds upon the revenue laws. In any case where a fraud was intended, the owner, consignee or importer would cause some other person to appear to be the owner, consignee, or importer, and as such, to enter the goods at the Custom House. If the fraud were not discovered, the real owner would of course treat the entry as good and would take the goods under it; but if the fraud were found out, the owner would turn round on the Custom House officers, and say. that the entry was null, not having been made by the owner, consignee, or importer, or a person thereto duly authorized. In the present case until the undervaluation was discovered at the Custom House the Appel-

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lants were willing to act upon, and did, by taking part of the goods, act upon the entry made by Jacques Tracey & Co.; and it was only *after* the seizure of a part of the goods that the pretension was advanced that the entry was made by an unauthorized person.

It is in vain for the appellants to say that Mr. Craig by whom the entry was made, had no authority from them. They authorized Jacques, Tracey & Co. to make the entry. Such entries, in the usual course of business, are made by the Custom House Clerk of the party whose business it is to make the entry; and in the present case, the Clerk Craig, who made the entry, held a regular power of attorney from Jacques, Tracey & Co.; and therefore the entry made by Craig is, as to its legal effects, the entry of the Appellants.

It has also been contended that the undervaluation of the oil cannot be considered fraudulent as it had not any fixed value at the place of shipment. But this pretension, which it was incumbent upon the Appellants to prove if they wished to derive any advantage from it is not borne out by the evidence. On the contrary we know exactly at what prices several lots of the same oil had, previously to the seizure, been sold to the appellants, and we also know that by a letter bearing date the fourteenth October, 1858, that being about four months before the entry in question, the manufacturers of the oil had written to Jacques, Tracy & Co, saying. "Our home orders and the demand from abroad exceed our means of supply near 3000 gallons, and we are reluctantly obliged to turn away orders for new services, that we may not disappoint our older friends."

Some objections were also made to the form of the entry, but in my opinion, they cannot be maintained, the provisions of the statute as to the form of entries are directory: and I am not aware of any irregularity in the entry which would justify us in treating it as null. The appellants themselves have acted upon it, and taken advantage of it, and cannot now be allowed to question it by exceptions as to form.

A great part of the argument before us turned upon the question respecting the legality of the seizure and sale of the oil claimed. Upon that part of the case, I do not deem it necessary to express my opinion: because, for the reasons already explained, it seems to me to be plain, that the oil in question was "*undervalued in the invoice and entry*" "for the purpose of avoiding payment "of part of the duties" payable thereon; that in consequence of such undervaluation the oil became forfeited under the positive provisions of our law; and that, after the forfeiture, the appellants ceased to have such an interest in the oil as to enable them to dispute the legality of the sale by the Custom House authorities.

For these reasons I am of opinion that the judgment of the Court below ought to be confirmed.

Judgment of Court below confirmed.

Strachan Bethune, for Appellants.

Henry Stuart, Counsel.

F. P. Pominville, for Respondent.

(s. B.)

MONTREAL, JUNE, 1863.

IN APPEAL FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

Coram AYLWIN, J., DUVAL, J. MEREDITH, J., MONDELET, J., MONK, J.

DAME JOSEPHTE VIGER,

Plaintiff in the Court below,

APPELLANT,

AND

JOSEPH BELIVEAU,

Defendant in the Court below,

RESPONDENT.

VERBAL LEASE—USE AND OCCUPATION—PLEADINGS.

Held:—1st. That in an action for rent where the lessee by his plea or otherwise admits the existence of a verbal lease, and occupation, the lessor may prove by witnesses the value and duration of the occupation.

2nd. In an action taken out under the Lessors' and Lessees' Act, where a portion of the demand is for rent payable for a house and another portion is for rent payable for moveables, the demand for rent is maintainable under this act as an accessory.

3rd. That the lessee, by one of his pleas, having admitted that he had to pay £180 of rent, and assessments, the Court, which maintains the demand of the lessor for £250 of rent, will not also allow him for the assessments which are only admitted or proved by such plea; in a word, the Court will not divide the admission in the plea.

4th. That the defendant having admitted by one of his pleas, the existence of a verbal lease, the admission of this plea will be taken against him, although the defendant have also pleaded the general issue.

The Plaintiff's declaration alleged:—

"Que par bail reçu à Montréal devant Mtre. C. F. Papineau et son confrère, notaires, le dix Février mil huit cinquante-huit, la demanderesse agissant par son procureur dûment fondé de procuration, Ulric Boudreau, commerçant de la Cité de Montréal, loua au défendeur présent et acceptant pour le terme et espace de trois années à compter du premier Mai alors prochain, savoir: —*Une maison à deux étages en pierre avec allonge, une cour et autres bâtisses en dépendant, située en la Cité de Montréal, bornée en front par la rue St. Vincent, derrière par les héritiers de feu Joseph Roy, Ecuier, d'un côté au nord-ouest par Félix Larocque, Ecuier, et d'autre côté par Séraphino Giraldi ou représentants.*

"Que ce bail fut ainsi fait à la charge par le Défendeur de payer toutes les cotisations et les taxes municipales auxquelles la dite propriété pourrait être assujettie pendant la durée du dit bail et en outre pour et moyennant le prix et somme de cent cinquante livres, cours actuel, de loyer par chaque année, payable par quartiers de trois mois en trois mois.

"Que le dit bail est expiré le ou vers le premier de Mai mil huit cent soixante-et-un, mais que le dit Défendeur a continué d'occuper et occupe encore les dites prémisses du consentement de la Demanderesse et comme son locataire, mais que la Demanderesse ayant fait des dépenses et améliorations considérables sur la dite maison, et l'ayant garnie d'une grande quantité de meubles pour l'usage du

John Viger, Défendeur, ce dernier promit lui payer pour l'année courante la somme de deux cent cinquante louis courant, cent quatre vingt louis pour la maison et dépendances et soixante-et-dix louis pour le loyer des dits meubles et de plus les cotisations.

"Que le dit Défendeur aurait de fait payé à la Demanderesse les deux premiers quartiers de loyer pour l'année courante sur le pied de deux cent cinquante louis et, savoir, le quartier échu le premier d'Août et le quartier échu le premier Novembre dernier.

"Que la valeur annuelle de l'occupation de la maison sus-désignée et dépendances avec les meubles et autres objets qui s'y trouvent, appartenant à la Demanderesse est d'au moins la dite somme de mille piastres.

"Que le premier février courant, il est devenu dû à la Demanderesse une somme de deux cent cinquante piastres pour un quartier du dit loyer, laquelle somme est encore due à la dite Demanderesse avec en outre trente piastres, pour cotisation spéciale imposée sur la dite maison en mil huit cent soixante, et soixante-et-huit piastres et soixante-et-quinze centins pour les cotisations de l'année mil huit cent soixante-et-un, que le dit Défendeur a négligé de payer.

"Que les trois dernières sommes susdites forment ensemble trois cent quarante-huit piastres, et soixante-et-quinze centins, courant, que le Défendeur néglige et refuse de payer à la Demanderesse quoique requis de le faire; ce qui oblige la dite Demanderesse à se pourvoir.

"A ces causes, la dite Demanderesse conclut à ce que le Défendeur soit assigné à comparaître devant cette cour pour voir dire et déclarer que, faute par le dit Défendeur d'avoir payé le loyer des prémisses sus-désignées pendant les trois derniers mois et suivant leurs conventions, le bail ou convention verbale, en vertu de laquelle le Défendeur tient et occupe les dites prémisses soit rescindé et annulé, et que le Défendeur soit condamné sous quarante-huit heures du jugement à intervenir de rendre et de remettre à la Demanderesse les dites prémisses sus-désignées avec tous les meubles et objets lui appartenant, sinon et à défaut par lui de le faire sous tel délai, qu'il en soit expulsé sous l'autorité de cette Cour en la manière ordinaire et ses meubles mis sur le carreau; conclut en outre la Demanderesse à ce qu'il émane un Bref de Saisie-gagerie pour saisir et arrêter par voie de Saisie-gagerie toutes les meubles et effets mobiliers appartenant au Défendeur et qui se trouveront dans la dite maison et dépendances pour satisfaction du dit loyer; que le Défendeur soit condamné à lui payer la dite somme de trois cent quarante-huit piastres soixante-et-quinze centins, courant, avec intérêt et les dépens; que la dite Saisie-gagerie soit déclarée bonne et valable et qu'il soit ordonné par le jugement à intervenir que les meubles effets ainsi saisis seront vendus en la manière ordinaire pour le produit de la vente d'iceux être la dite Demanderesse payée de sa dette en capital, intérêts et dépens."

L'Intimé rencontra la poursuite de l'Appelante par plusieurs moyens; 1^o par une défense au fonds en droit, 2^o par deux exceptions péremptoires et 3^o enfin par une défense au fonds en fait.

La défense en droit ne fut formée que contre cette partie de la demande qui traitait au loyer de \$250 et à la cotisation de \$68.75, prétendus dûs en vertu

d'une certaine convention verbale ou d'un contrat de louage. A l'appui de cette défense, l'Intimé soutenait que les conditions essentielles au contrat de louage n'étaient pas énoncées dans la déclaration; par exemple qu'il n'y avait aucun allégué de la durée du prétendu bail verbal, ni de termes ou quartiers de paiement; qu'au contraire, il apparaissait sur la face même de l'action que le loyer était payable par année et qu'en conséquence, l'Appelante était mal-fondée à répéter aucun loyer de l'Intimé avant l'expiration de l'année.

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Jos. Belliveau,

Les parties furent entendues sur ce plaidoyer préliminaire, qui fut renvoyé sans frais; et l'Intimé ayant excepté à ce dernier jugement, elles en vinrent aux autres moyens de défense.

L'Intimé résume les allégués de ses deux exceptions dans les avancés suivants; que la convention qui eut lieu entre l'Appelante, agissant par son fils et son procureur, M. Ulric Boudreau et lui, n'est pas telle que relatée dans la déclaration; qu'il fut convenu en effet dans le courant de Janvier 1861, que le bail serait de cinq ans à compter du mois de Mai 1861, à raison de cent quatre-vingt louis par année pour la maison et dépendances réparées et de plus en payant les taxes et cotisations; que quant aux meubles qui furent plus tard apportés dans l'Hôtel Richelieu par M. Boudreau, l'Intimé ne les reçut qu'à la condition qu'il ne paierait pas plus de loyer pour la première année, savoir: £180, et ce, en considération des dommages qu'il avait soufferts pendant trois mois, lorsque l'Appelante faisait réparer l'Hôtel; mais que pour les quatre dernières années, il lui paierait, £70 de plus, savoir: £180, pour la maison et £70 pour les meubles; ce qui fut accepté par le procureur de l'Appelante. Puis, attendu que l'Intimé au temps où l'action en expulsion fut prise contre lui, devait une balance de loyer, d'après la convention, telle que plus haut relatée par lui, il offrit quarante piastres, balance de loyer due le premier février dernier sur la propriété ensemble avec la cotisation due de soixante-et-huit piastres et soixante-et-quinze cents, la taxe spéciale de trente piastres, prétendue due sur l'année 1860 et 1861, et les frais encourus jusqu'au temps de l'offre, se montant à la somme de dix louis sept chelins et deux deniers courant; en tout la somme de \$180.19, que l'Intimé offrit avec ses exceptions et d'après les faits qui y sont relatés.

L'Appelante refusa cette offre et une contestation fut liée entre les parties, comme si aucune offre n'avait été faite.

After proof made, the Court below, (Berthelot, J., April 1st. 1862), rendered the following judgment:

"La Cour, etc., considérant qu'il n'y a aucune preuve de bail verbal invoqué par la Demanderesse en sa déclaration comme ayant eu lieu entre elle et le Défendeur de la maison et dépendances, désignées en la déclaration et que les conclusions de la déclaration pour expulsion ne reposent pas sur des allégués d'occupation suivant la loi à cet égard, mais bien seulement sur des allégués de conventions de bail ou conventions verbales, qui n'ont pas été prouvées; et considérant de plus que la demande pour loyers ne peut réussir sans que la demande en expulsion soit suivie d'un jugement a débouté la présente action avec dépens," etc.

From this judgment the Plaintiff appealed.

Joseph Viger,
and
Jos. Beiliveau.

MONDELET, J.—Je n'ai pas l'ombre de doute quant au bien jugé de cette cause, en Cour de première instance, (Juge Berthelot) pour la raison toute simple, que l'action est fondée sur l'allégué d'un bail verbal, et non sur l'usage et occupation simplement. L'allégué qui, en bonne procédure, ne pouvait aller en compagnie du bail, comme moyen distinct d'action, n'est fait qu'incidemment.

Outre cela, il ne pouvait, aux termes du statut des locateurs et locataires, y avoir jugement pour loyers, qu'autant qu'il y a un bail. Or, ici, il n'y a aucune preuve de bail. D'ailleurs, la section de l'acte qui substitue l'usage et occupation comme présomption d'un bail, n'a aucun rapport aux meubles, et n'a rapport aux propriétés que dans le cas où il y a occupation, avec la permission ou consentement du propriétaire sans bail, c'est une disposition de la loi qui a rapport aux héritages seulement.

Et cette section pût elle même, par une interprétation forcée, être appliquée aux meubles meublans, comment pourrait-on soutenir un jugement fondé sur des conclusions pour obtenir que le bail soit annulé (sur les conclusions à cet égard, dans la cause actuelle), puisque dans le cas de simple usage et occupation, il n'est aucunement question d'un bail.

Il est bon de remarquer, qu'il n'en est pas de ces actions, comme d'une action d'assumpsit, dans laquelle on introduit *par tolerance* toutes sortes de chefs. Ici, cette action doit être pour une chose ou pour une autre. Or, comme les conclusions, sont exclusivement fondées sur un Bail, il est hors de question, que la Cour accorde ce qui n'est aucunement demandé, et ce à quoi il est bien évident que la Demanderesse elle-même ne songeait pas.

Quant aux offres faites avec les *Exceptions* elles ont été refusées. Elles ne lient pas le Défendeur, et la Cour aurait violé tous les principes, si elle eût donné à ces offres, une portée et un effet qu'elles ne peuvent avoir. Et en basant un jugement sur ces offres et rendant ce jugement sur un allégué glissé comme par accident et sans portée dans le corps de la Déclaration sans conclusions y ayant trait, la Cour eût rendu un jugement dépassant les allégués de la Déclaration, un jugement nul par conséquent, et qui eût donné lieu à la requête civile, sans qu'il fût besoin d'un appel à cette cour pour casser ce jugement.

J'adopte donc, sans hésiter, le jugement de la Cour de première Instance dont le motif aussi concluant en logique qu'en loi, et en saine procédure, ne laisse rien à y redire. Le voici,

“La Cour etc, considérant qu'il n'y a aucune preuve du bail invoqué par la Demanderesse en sa déclaration comme ayant eu lieu entre elle et le Défendeur de la maison et dépendances désignées en la Déclaration et que les conclusions de la déclaration pour expulsion ne reposent pas sur des allégués d'occupation suivant la loi à cet égard, mais bien seulement sur des allégués de conventions de bail ou conventions verbales, qui n'ont pas été prouvées; et considérant de plus que la demande pour loyers ne peut réussir sans que la demande en expulsion soit suivie d'un jugement, a débouté la présente action avec dépens, etc.

J'opine donc pour la confirmation du jugement dont est appel.

MEREDITH, J.—The defendant in the Court below, now the respondent, occupied the establishment in the city of Montreal, known as the hotel Richelieu, as the tenant of the appellant for some years before the first of May, 1861.

About that time the plaintiff made extensive improvements in the hotel, and put furniture into it of considerable value; in consequence of which, according to the allegations of the plaintiff's declaration, it was agreed between the parties, that the defendant should pay £250, as rent for the year beginning on the first of May 1861; that is to say, £180, for the house and dependencies, and £70 for the furniture used in furnishing the establishment; the assessments to be payable by the leasee.

Joseph Viger,
and
Jos. Belliveau.

The plaintiff by his declaration further alleged that the enjoyment of the said premises and furniture was actually worth £250, per ann.; that the said defendant had paid the plaintiff for the enjoyment of the said premises at that rate for the quarters due on the first of August and the first Nov., 1861; but that he had failed to pay the rent for the quarter due on the first day of Feb., 1862; and the plaintiff in consequence, concluded (his suit being under the lessors' and lessees act) for the rescision of the lease, for the ejectment of the defendant, and for a condemnation for the said rent and costs.

The defendant pleaded that the plaintiff had verbally leased the said premises to him for five years at the rate of £180 per annum and the assessments; that for the reasons mentioned in the plea, he was not to pay anything for the use of the furniture for the first year; but that for each of the following years he was to pay for the use of the hotel and furniture at the rate of £250 per annum, and the defendant tendered as the balance of rent due by him \$40; and on account of assessments and a special tax for 1860, \$98.79; and for costs £10.7s. 2d., in all \$180.19

In the course of the *Enquête* the defendant gave an admission in the following words:

"Le Défendeur admet pour éviter des frais, (mais sans préjudice à ses défenses et objections à la preuve de la valeur et de l'occupation), que la valeur annuelle de la maison désignée en la déclaration en cette cause, et des meubles de la Demanderesse qui s'y trouvent est de deux cent cinquante louis courant, savoir, cent quatre-vingt livres pour la maison, et soixante-dix livres pour les meubles."

The Plaintiff however did not, in the Court below, derive any advantage from the admission so given, nor from the Defendant's tender of \$180.19; for by the judgment complained of, the action of the Plaintiff was dismissed with costs.

All the judges now present, excepting my learned brother Mondelet, are of opinion that the judgment thus rendered by the Superior Court cannot be maintained.

Both parties admitted that the Defendant held the premises under a verbal lease from the Plaintiff: the occupation was also admitted; and under these circumstances we think as the parties differed as to the rate of rent payable by the Defendant, that the Plaintiff had a right to prove the value of the occupation by parol evidence, and in this case evidence was rendered unnecessary by the admissions already adverted to. This view, which we think reasonable, is fully borne out by the authorities cited by the learned counsel for the Appellant.

Poulain du Parc. Vol. 9, p. 208, puts the following case: "Un propriétaire a affirmé verbalement son héritage, et il est hors d'état de faire la preuve par

Joseph Viger, " témoins de la somme à laquelle porte la convention parce qu'elle excède 100
and
Jos. Belliveau. " livres."

" Si le fermier avoue sa jouissance, et si la contestation est sur le temps qu'il a
" joni et sur le prix de chaque année; des témoins prouveront le nombre d'an-
" nées et des experts en régleront la valeur."

Monteuel, in his valuable little treatise, *Instructions faciles sur les conventions*, after saying that a party seeking to enforce a verbal lease *not followed by occupation*, has no other resource than the oath of his antagonist, then speaks of the case when the verbal lease *has been followed by occupation*; and with reference to that case, the author says, p. 177.

" Quand le locataire a occupé l'appartement, il est toujours tenu de payer le loyer du temps qu'il l'a occupé.

L'on défère le serment au propriétaire; il en est cru sur le prix annuel du loyer, à moins qu'il n'y eût une mauvaise foi visible. Tel est l'usage de Paris. Il serait injuste d'obliger les parties à des estimations toujours dispendieuses et peu fidèles.

Toullier, vol. 9, p. 39, No. 92.

After giving the article No. 1710, of the Code Civil which is in the following words:

" Lorsqu'il y aura contestation sur le prix du bail verbal, dont l'exécution a commencé, et qu'il n'existera point de quittance, le propriétaire en sera cru sur son serment," adds

" Ces dispositions, comme on le voit, sont en tout conformes à l'usage de Paris, mais le dernier y déroge, en ajoutant:

" Si mieux n'aime le locataire demander l'estimation par experts auquel cas les frais de l'expertise restent à sa charge, si l'estimation excède le prix qu'il a déclaré.*

These authorities, we think justify us in affording the Plaintiff (now the Appellant), relief from the judgment complained of; and indeed it seems to me contrary to the general principles of our law, in a case such as the present, where the Plaintiff claims rent from her tenant at £250 per annum, and where the tenant actually tenders rent at the rate of £180, with costs, for the Court to say to the Plaintiff, " you shall not have even the rent and costs tendered, and on the contrary your action shall be dismissed with costs."

Some objections were, urged against the form of the declaration, in so far as it relates to the value of the use and occupation of the premises in question, but those objections are not, I think, well founded.

The allegation in the declaration as to the value of the use and occupation is as follows.—

" Que la valeur annuelle de l'occupation de la maison sus-désignée et dépen-

* The other authorities cited by Appellant are Loaré, 14, vol. pp. 279, 409, 423; Duvergier, 3 vol. No. 267, p. 239; Dalloz, Jur., du Royaume, vol. 9, verb. louage, p. 903 et seq.

dances avec les meubles et autres objets qui s'y trouvent appartenant à la Demanderesse est d'au moins la dite somme de \$1000 ;" and this allegation it appears to me is quite sufficient.

Josephte Viger.
and
Jos. Belliveau.

It has also been contended that in a declaration alleging a verbal lease, a count for use and occupation cannot be inserted; but it does not seem to me that a count alleging a verbal lease, and a count for use and occupation are inconsistent with each other. If A. B. has held a house worth £50 per annum, belonging to C. D., under a verbal lease from him for a period of a year, C. D., after a count alleging the verbal lease, might with truth aver that A. B. had had the use and enjoyment of a house, belonging to him, with his consent and permission, for a period of one year, and that the use and occupation of the said premises for the said period was reasonably worth £50. C. D., if he had occasion to sue A. B. in the case supposed, might feel doubtful of his being able to prove the verbal lease; and under such circumstances a count for use and occupation would plainly be necessary for the protection of his interests against an unjust defence.

The general practice has certainly been to add a count for use and occupation to the count alleging a verbal lease.

No authorities have been cited, nor so far as I know have any reasons been urged in support of the opinion opposed to the practice to which I have adverted; and for my part I cannot discover any grounds that justify us in disturbing it.

On the part of the Respondent it was also contended, that, at the least, the action ought to be dismissed as to that part of the rent payable on account of the moveables.

We however think, that the premises leased must be regarded as an hotel partly furnished, and that the furniture may be considered as an accessory of the establishment for which it was purchased and in which it was used.

Our judgment will therefore be in favour of the Appellant, rescinding the verbal lease, ordering the ejectment of the Defendant, and condemning him to pay a quarters rent at the rate of £250 per annum, and also the special tax of \$30 for the year 1860, tendered; but we do not condemn the Defendant to pay the assessments for 1861, because the admission as to the value of the occupation does not cover the assessments. It is true that the Defendant, by his pleadings and tender, admits that the assessments were payable by him: but this admission is accompanied by a statement that the rent payable by the Defendants for the year 1862, was not the sum of £250 per annum, which we allow, but £180 per annum only.

The admission of the Defendant in his plea, therefore, is that he had to pay £180 per annum, and assessments, and under that admission we cannot after allowing the Plaintiff at the rate of £250 per annum for rent, also allow the assessments.

In a word we cannot divide the admission contained in the plea; and as to the admission given at the enquête it does not embrace the assessments.

It is satisfactory to me to be able to add that Mr. Justice Duval, who heard this case with the judges now present, agrees with the majority of the Court in the Judgment now being rendered.

The judgment in appeal was *motivé* as follows:

Joseph Viger,
and
Jos. Bellevue.

"Seeing that the appellant in and by her declaration in this cause filed, alleged that the respondent from the first day of May one thousand eight hundred and sixty-one, until the twenty-fifth day of February one thousand eight hundred and sixty-two, occupied and enjoyed the premises mentioned and described in the said declaration, together with certain articles of furniture used for the furnishing of the said premises and mentioned in the said declaration under a verbal lease between the said parties.

Seeing that it is also contended on the part of the respondent in this cause that he occupied the said premises for the said period, under a verbal lease from the appellant.

Seeing that although both the said parties admit that the said premises were so occupied by the respondent under a verbal lease from the appellant to the respondent, yet that they differ as to the amount of rent payable by the respondent to the appellant, under the said verbal lease, for the use and enjoyment of the said premises.

Seeing that the appellant in her said declaration after reciting the making of the said verbal lease, and the occupation by the respondent of the said premises, from the first day of May 1861, until the said twenty-fifth day of February one thousand eight hundred and sixty-two, doth allege that the value of the use and occupation of said premises including the said articles of furniture was worth at least £250, currency, per annum.

And considering that as both the said parties admit the existence of a verbal lease, and the enjoyment of the said premises by the respondent as the tenant of the appellant, under such verbal lease, but differ as to the rate of rent payable under such verbal lease, the appellant had a right to prove by *parol* evidence the value of the use and occupation of the said premises including the said articles of furniture.

And seeing that both the parties in this cause have expressly admitted that the said premises including the said furniture are of the annual value of two hundred and fifty pounds currency; and considering that on the first day of February, one thousand eight hundred and sixty-two, the sum of two hundred and fifty dollars became due to the appellant by the respondent, as the rent for the said premises, including the said articles of furniture, from the first day of November, one thousand eight hundred and sixty-one, until the first day of February, one thousand eight hundred and sixty-two, and that the said appellant had a right to recover that sum in and by her said action, and to cause the respondent to be ejected from the said house and premises in the manner prayed in and by the declaration of the appellant; and therefore that in the judgment of the Court below dismissing the action and demand of the said appellant there is error; doth in consequence reverse the said judgment, to wit, the judgment rendered by the Superior Court in this cause on the first day of April, one thousand eight hundred and sixty-two; and proceeding to render the judgment which the Court below ought to have rendered in the premises, doth rescind and set aside the said verbal lease from the said appellant to the said respondent, and doth condemn the said Joseph Bellevue within three days from the service upon him of a copy of the present judgment, to deliver up to the said appellant the

said premises, to wit, "Une maison à deux étages en pierre avec alonge, une cour et autres bâties en dépendant, située en la cité de Montreal, bornée en front par la rue St. Vincent, derrière par les héritiers de feu Joseph Roy, Ecuier, d'un côté par Séraphino Giraldi, ou représentans," with the said articles of furniture, and that in default of the said Joseph Beliveau so doing within the said period of three days it is further ordered and adjudged that the said Joseph Beliveau be ejected from the said premises in due course of law, and that the furniture and effects of the said Joseph Beliveau in and upon the said premises be placed in the public street at his own risk, *mis sur le carreau*; and the attachment made in this cause of the furniture and effects of the said Joseph Beliveau is hereby declared good and valid; and the said Joseph Beliveau is also hereby adjudged and condemned to pay to the said appellant the said sum of two hundred and fifty dollars, and also thirty dollars currency, being the assessments on the said premises for the year 1860, which the said respondent hath acknowledged to be due by him, and which he hath tendered to the appellant, which two sums of money form together \$280 currency; and the Court doth also condemn the respondent to pay to the appellant interest on the said sum of two hundred and eighty dollars currency, from the twenty-eighth day of February, one thousand eight hundred and sixty-two, date of the service of process in this cause until paid, and costs as well in this court as in the court below; and the goods and chattels of the said Joseph Beliveau, seized and attached under the said writ of *caisie gagerie*, are hereby ordered to be sold in due course of law, in order that from the proceeds of the sale thereof the said appellant may be paid the said sum of two hundred and eighty dollars, currency, with interest and costs as aforesaid.

Joseph Vigor
and
Jos. Beliveau.

And it is ordered that the record be remitted to the court below.

Judgment reversed.

Dorion & Dorion, for Appellant.

Girouard, for Respondent.

(F. W. T.)

MONTREAL, 1st JUNE, 1863.

IN APPEAL.

FROM THE SUPERIOR COURT, DISTRICT OF BEDFORD.

Coram AYLWIN, J., DUVAL, J., MEREDITH, J., MONDELET, J., BERTHELOT, J.
ARIEL KINNEY,

Plaintiff in the Court below,

AND

APPELLANT,

LEVI A. PERKINS,

Defendant in the Court below,

RESPONDENT.

RULES OF PRACTICE—SERVICE OF SUMMONS.

Held:—That service of a Writ of Summons made before eight of the clock in the morning is bad.

This was an appeal from a judgment of the Superior Court, District of Bedford, which maintained an *exception à la forme* of the Defendant, and dismissed

Ariel Kinney,
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the action of the Plaintiff with costs. The Defendant, by his exception, alleged that there was no legal service upon him of the Plaintiff's action; that the only service of the Writ and declaration was made between the hours of seven and eight o'clock in the forenoon, "whereas by the rule of practice of the Superior Court, service could only be made between the hours of eight in the forenoon, and seven in the afternoon."

It appeared by the Bailiff's return, that on the 17th August, 1861, between the hours of 7 and 8 of the clock in the forenoon, he served the Defendant by leaving true copies of the Summons and declaration with the Defendant personally, at his domicile.

The correctness of the Bailiff's return was not disputed, the Defendant resting his case wholly upon the fact that the service was made before 8 o'clock in the morning. The following was the judgment of the Court below, rendered by McCORD, J., on the 18th February, 1862.

"The Court, having heard the parties by their Counsel, on the merits of the exception *à la forme*, by the Defendant in this cause filed, doth maintain the said exception, and, doth, in consequence, dismiss the action of the Plaintiff, with costs."

Dorman, for the Appellant, contended that by the law of Lower Canada, service of process made between sunrise and sunset (*de jour et avant le coucher du soleil*), was a good and valid service, and the rule of practice, in its application to services during certain seasons of the year, was a departure from the provisions of the common law; that the rule of practice was directory only; that its observance was not enjoined *à peine de nullité*, and that non-conformity with its provisions did not affect the service in question with absolute nullity. The motive which led to the establishment of the rule, was undoubtedly to protect the Defendant from service or other disturbance at an unreasonable hour. In this case, this reason is wanting, for the service was personal; it was made more than two hours after sun rise, and it was so made upon a farmer, who, as appears by the evidence, was, at the time of the service "about his ordinary business, and made no objection to it."

Doherty, for the Respondent:—It was contended by the Appellant, that the Judges in forming this rule of practice transcended their authority, and it was assumed that the hours of service were regulated by positive law; i. e. that the maxim *sol occasus suprema tempestas esto*, was the law of Canada, and that the rule of practice was therefore a nullity. It was not true, that the maxim of the Roman Law in regard to service, was ever the rule in Canada, nor even in France.—Le Camus Denizart, 2 Vol. p. 453 *verbo*: assignation. Previous to the framing of our present Rules of Practice, which came into force on the 17th December, 1850, the decisions of the tribunals of lower Canada varied, the practice in the different districts being different, as appeared by contradictory decisions on this point. As late as November, 1850, we see this want of uniformity made manifest in the Superior Court, Quebec, in the case of Robinson, vs. McCormick: 1. L. C. Reports, 27. This decision was rendered immediately previous to the promulgation of the Present Rules of Practice. The legislature, seeing the uncertain, of Practice, and for the express purpose of

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securing uniformity, as set forth in the preamble to the enactment, by the 12 Vict. cap. 38, sec. 100, authorized any six judges of the Superior Courts to make Rules, &c., in pursuance of which enactment, the present Rules of Practice were made. That, in France, as well as in our own country, service of process was not regulated by absolute law, but by a rule of practice, which rule varied in different jurisdictions. But by the 20th Vict. cap. 44, sec. 88, it was expressly enacted, as if to remove all doubts on the subject, that the rules of practice, then in force should remain in force until otherwise ordered by competent authority; thus adding the authority of the legislature to the order of the judges in establishing the rules, in obedience to which the action was dismissed as aforesaid. See Lower Canada consolidated statutes, cap. 83, sec. 148, subsection 5.

The argument which attacked the validity of the rule of practice in question, if maintained, would virtually invalidate every rule in the whole category. Thus, it was a matter of law, that a Defendant, if sued by a person residing beyond the limits of the Province, was entitled to security for costs; this then was a matter of right, yet the rule of practice ordained that the right must be claimed within a certain number of days from the appearance of the party claiming it, else it would be held to be waived. Again, if a party were impleaded before a Court not having jurisdiction, by law he would be entitled to file a plea to the jurisdiction; yet the rule of practice prescribed that he could not do so unless he should first have made a deposit of a sum of money. All rules of practice necessarily abridge to some extent the absolute rights of suitors; but it is a necessary restraint, else there would have been no rule but arbitrary discretion. Although, all persons might sue, and might serve writs of process on those they pursued, yet they must have come into Court conformably to the rules of Court. Order, regularity, and certainty were the objects to be attained, and it was clearly within the power of the Court to frame rules to regulate the time and manner in which suitors might assert their claims, else no rule would be of any force; for every rule tended to curtail the exercise of some legal right and to regulate the manner in which it might be exercised.

The Respondent in conclusion, submitted, that the maxim *sol occasus*, &c., upon which the Appellant relied, defined no time within which service should be made, and that as a rule of procedure, it was wholly superseded by our own rules of practice, made by competent authority, and with reference to the actual jurisprudence of our country, and the means necessary to facilitate the administration of justice in our own Courts. These rules, relied upon by the Respondent, had been carefully made by our judges, as directed by law, and deliberately sanctioned by the Legislature; in fact made the law of procedure as above remarked, and the judgment appealed from, had been rendered in conformity with these rules so made and sanctioned. Had the Hon. Judge then erred in rendering judgment? If so, what law or rule of law had he violated? In rendering the said judgment, His Honor was bound by the rules authoritatively prescribed for his guidance.

AYLWIN, J.—This is an appeal from a judgment rendered by the Superior Court, in the District of Bedford, maintaining an *exception à la forme* of the

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and
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Defendant, and dismissing the action of the Plaintiff now Appellant with costs. The Respondent, by his exception, says, that there was no legal service upon him of the Plaintiff's action, that the only service of the writ and declaration was made between the hours of seven and eight o'clock in the forenoon, whereas "by the Rule of practice of the Superior Court, service could only be made between the hours of eight in the forenoon and seven in the afternoon." It appears by the Bailiff's return, that on the 17th day of August, 1861, between the hours of seven and eight of the clock in the forenoon, he served the Defendant by leaving true copies of the Summons and declaration with the Defendant *personally* at his domicile. The correctness of the Bailiff's return is not disputed: the Respondent resting his case wholly upon the fact that the service was made before eight o'clock in the morning. The judgment is in these terms: "the Court having heard the parties by their counsel on the merits of the *exception à la forme* by the Defendant in this cause fyled, doth maintain the said exception, and doth, in consequence, dismiss the action of the said Plaintiff with costs." It contains no *considéranes*, and the Respondent in support of his exception rests solely upon the rule of practice of the Superior Court, which is in the following terms—it is chapter 4 No. 18: "That every service of process and other service on any party to a suit be made between the hours of eight in the forenoon and the hour of seven in the afternoon." But it is not enacted *à peine de nullité*. The rule is then directory merely and is not imperative or mandatory. To give it such a stringent application as to dismiss an action appears to me to be contrary to every rule of law. The 10th section of the 2d chapter of the rules of practice, it is true, contains the following provision—"that every wilful breach of an order or rule of practice of this Court (for which no fine or other specific punishment is provided in the body of such rule or order,) shall be considered a contempt of Court and punished accordingly:"—but such punishment would hardly be dreamed of for such an offence as the service of a Bailiff, half an hour too soon before the 8 o'clock of the rule which substitutes the old Roman *sol occasus*.

If it be necessary to enforce the rule in question, the 11th section of the 2 chapter would be sufficient (which immediately follows the contempt of court rule); it enacts—"that in computation of time no fractions of a day be allowed, nor shall any Sunday or binding holiday (*fête d'obligation*) be reckoned, unless otherwise provided for by law."

At the utmost, the service should have been held to be reckoned on the 18th of August, 1861, instead of the 17th; but then the service would have been sufficient, as the return day, was as late as Monday the 2d September, fully in time. If it be necessary to mark the rule as to the hour of 8, though I conceive it to be wholly unnecessary, seeing that the service was before the hour, the Bailiff may have been mulcted in the cost of the service; but the dismissal of the suit I confess to be a hardship not justified by any Law that I can understand. I am apprehensive that the enforcement of the rules of practice under similar circumstances would be dangerous in the extreme, as manifestly there is a large number of cases, in which rules far more important are to be found, in which they are not observed and no attempt at dismissal of an action has been made or

thought of. I am therefore of opinion, that such a rule which has been attempted would be more just in the breach than the observance, and that the judgment of the Court below should be reversed.

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and
Levi A. Perkins,

BERTHELOT, J.—La règle no. 18 des règles promulguées par la cour Supérieure ou six des juges la composant, sous l'autorité de la loi 12 V. c. 38 s. 100 et sanctionnées par la 20 V. c. 44, s. 88, rapportée au ch. 83 des statuts refondus pour le Bas-Canada, sous-sect. 5 de la s. 148, du ch. 83 exige que la signification de toute assignation d'une partie soit fait entre huit heures du matin et sept heures de l'après-midi.

Dans cette cause, le retour constate que la signification a eu lieu avant 8 heures, et le Défendeur en a fait le sujet d'une exception péremptoire à la forme qui a été maintenue par la Cour. Si l'Huissier pouvait le faire avant 8 heures, il pouvait aussi bien le faire avant 5 ou 6 heures du matin, ce qui pourrait être, sujet à de bien grands inconvénients. Mais ce n'est pas là la question. Il s'agit de savoir si la règle de pratique doit être observée ou non.

Le jugement de la Cour Supérieure a eu pour effet de la reconnaître et de lui donner exécution. Je ne vois pas trop comment une cour d'appel pourrait déclarer que ce jugement a violé la loi. Car la règle de pratique en matière de procédure est la loi, lorsque les règles de pratique promulguées par la Cour ont été sanctionnées et approuvées par la législature.

Je suis d'avis que ce jugement doit être confirmé. Si nous faisons autrement nous jetterions un trouble infini dans la pratique et les Cours de tous les districts. Et où pourrions-nous nous arrêter ?

Abbott & Dorman, for Appellants.

M. Doherty, for Respondent.

Judgment affirmed.

(*r. w. r.*)

COUR SUPERIEURE.

MONTREAL 16 FEVRIER, 1863.

Coram MONK, J. A.

No. 2128.

Massue vs. Crebassa.

JURY:—1o Que le délai accordé au faiseur du billet par le porteur d'icelui à l'insu de l'endosseur qui l'a payé longtemps après son échéance et après l'octroi du délai, ne peut pas être opposé à ce dernier sur son action en recouvrement du montant de ce billet.

2o. Que ce délai n'a pas l'effet de libérer l'endosseur.

3o. Que cet endosseur n'est pas tenu d'offrir avec son action au Défendeur les billets subséquents livrés au porteur comme billets d'accommodement ou de simple délai.

Le Demandeur réclamait par son action la somme de \$500.00 montant d'un billet souscrit par le Défendeur en sa faveur le 4 Avril 1861 et \$2.05 coût du protêt et intérêts.

A cette demande, le Défendeur plaida l'exception suivante :

" Qu'il est bien vrai qu'il a consenti le billet relaté dans la dite déclaration aux époques qui y sont mentionnées et que le susdit billet a été protesté faute de paiement à son échéance ; mais que le dit Demandeur, à l'exécution aussi bien qu'à l'échéance du dit billet, n'en était pas et n'en a pas été depuis le vrai

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et seul porteur et propriétaire pour valeur et de bonne foi, et qu'il le dit Défendeur n'a jamais promis d'en payer le montant avec l'intérêt à raison de sept pour cent, ainsi qu'il est faussement allégué dans la dite déclaration et plus particulièrement, le dit Défendeur déclare :

" Que lors de l'échéance du dit billet et depuis son exécution, à savoir : le huit de Juillet, mil huit cent soixante et un, Monsieur Alexis Mousseau, courtier et marchand à commission de Montréal, était le seul et vrai propriétaire du dit billet et qu'en effet, il a été protesté à la demande et requisition du dit Alexis Mousseau, ainsi qu'il appert en référant au protêt en double produit en cette cause par le dit Demandeur lui-même, et que là et alors le dit Demandeur était et a toujours été partie au dit billet comme premier endosseur.

" Que le susdit billet est demeuré en la possession du dit Alexis Mousseau, jusqu'au vingt troisième jour de Juin dernier, jour auquel le dit Demandeur en eût la livraison et remise, mais sans avoir donné aucune valeur et de mauvaise foi, et dans le seul but de prêter son nom au dit Alexis Mousseau.

" Que ce transport et cette livraison du dit billet faits après son échéance n'a pas l'effet d'enlever au dit Défendeur tous les droits et moyens qu'il aurait pu opposer contre le dit Alexis Mousseau, mais qu'au contraire le dit Demandeur est sujet et soumis aux mêmes objections, vices, défenses et exceptions que le dit Défendeur pourrait opposer, si le dit Alexis Mousseau était réellement le Demandeur en cette cause.

" Que le sept d'Octobre dernier, le dit Défendeur n'ayant pu rencontrer le dit billet à son échéance ainsi qu'il le déclare plus haut, et ne pouvant même le payer à l'époque en dernier lieu mentionnée, renouvela le dit billet relaté dans la déclaration par un autre billet en date de Montréal, sept Octobre mil huit cent soixante et un, pour le même montant payable à trois mois de cette date également à l'ordre propre du dit Défendeur au bureau de la Banque du Peuple signé et endossé par lui et remis au dit Alexis Mousseau.

" Que ce dernier billet devint dû et payable le dix Janvier dernier, et ne pouvant encore le rencontrer, le Défendeur le renouvela par un autre billet en date de cette dernière époque pour le même montant payable à même lieu à quatre mois de date, signé et endossé par le dit Défendeur et remis au dit Alexis Mousseau.

Que le treize de Mai dernier, ce dernier billet devint dû et que là et alors le dit Défendeur ne pouvant également en payer le montant convint là et alors avec le dit Alexis Mousseau de le renouveler et effectivement le renouvela là et alors par un autre billet en langue anglaise portant date " Montreal thirteenth May, one thousand eight hundred and sixty two " conçu dans les termes suivants, " Three months after date I promise to pay to my own order at the office of La Banque du Peuple in Montreal, the sum of five hundred dollars for value received," signé, " John George Crebassa " et endossé également, " John George Crebassa " savoir la signature et endossement du dit Défendeur, et qui fut remis et livré par lettre au dit Alexis Mousseau, le quatorze de Mai dernier.

" Que le dit Défendeur signa, endossa et livra au dit Alexis Mousseau les susdits billets et plus particulièrement le billet daté du treize Mai dernier, sous l'expresse condition et stipulation avec lui que ce serait en renouvellement du

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du billet sur lequel le dit Demandeur a appuyé sa présente action, et que le dit Alexis Mousseau attendrait l'échéance des billets donnés en renouvellement, plus particulièrement l'échéance du billet en date du treize Mai dernier, ce à quoi le dit Alexis Mousseau consentit et acquiesça, ainsi que le dit Défendeur entend le prouver d'ailleurs et ainsi qu'il appert de plus en référant aux lettres mêmes du dit Alexis Mousseau produites avec les présentes comme en faisant partie.

"Que le dit billet en date du treize de Mai dernier devint dû et payable longtemps après l'institution de cette action, à savoir : le seize d'Août dernier.

Que le dit Alexis Mousseau a toujours retenu en sa possession tous les dits billets du dit Défendeur, tant le billet originaire que ceux en renouvellement, et qu'il a toujours refusé de les lui remettre, et qu'il les retient aujourd'hui encore en sa possession.

"Qu'ainsi il y a eu novation du premier billet sur lequel cette action est basée, lequel était éteint au temps où elle a été instituée et l'est encore, et que partant l'action du dit Demandeur, qui est aux droits du dit Alexis Mousseau, est mal fondée, et que dans tous les cas, le dit Demandeur était tenu de remettre et offrir au dit Défendeur, avec sa présente action, les autres billets donnés en renouvellement ou à l'occasion du premier billet.

"Que de plus, le dit Défendeur a payé le coût du protêt du dit billet relaté dans la déclaration ensemble avec la somme de cent piastres que le dit Alexis Mousseau a usurairement imputé sur les intérêts et retenu à titre de commission sur les billets donnés en renouvellement."

Le Demandeur répondit spécialement à cette action comme suit :

"Que le billet dont il est question en cette cause et qui fait la base de cette action, a été remis et livré au dit Demandeur pour valeur reçue et de bonne foi.

"Que le dit Demandeur a été obligé et forcé comme endosseur du dit billet, pour se soustraire aux poursuites et à des frais, de payer le montant du dit billet à Alexis Mousseau, courtier, et agent de change de Montréal, et partant le dit Demandeur est ainsi devenu le porteur et créancier *bonâ fide* du dit billet que le dit Demandeur n'avait endossé que pour favoriser le dit Défendeur et pour son accommodation.

"Que le dit Demandeur n'a jamais eu aucune connaissance d'aucun renouvellement de tel billet par le dit Défendeur avec le dit Alexis Mousseau, car s'il l'eut su, il aurait inévitablement pris avantage de toute novation qui aurait pu intervenir alors, avant que de payer le dit billet, sur lequel il était endosseur.

"Que toutes les prétendues transactions qui ont pu avoir lieu entre le dit Défendeur, et le dit Alexis Mousseau ; ne sont jamais parvenues à la connaissance du dit Demandeur, qui, menacé par le dit Alexis Mousseau d'être poursuivi pour le montant du dit billet sur lequel il le dit Demandeur était endosseur, a été forcé de le payer.

"Que c'est lui, le dit Défendeur qui est en faute, en ne se faisant pas remettre le dit billet qui fait la base de cette action, lorsqu'il a renouvelé le dit billet comme il le prétend.

"Que de fait, le dit Défendeur n'a jamais renouvelé le dit billet, et le dit Alexis Mousseau n'a jamais voulu le renouveler, pour par lui pouvoir toujours conserver l'endossement du dit Demandeur, et que toutes autres transactions

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que le dit Défendeur a pu faire avec le dit Alexis Mousseau par billets ou autrement, ont été des transactions distinctes et séparées du dit billet qui fait la base de cette action, et tous deniers que le dit Défendeur a pu payer au dit Alexis Mousseau, soit en capital ou intérêts, n'ont jamais été payés à compte ou en déduction du dit billet qui fait la base de cette action, et dont le dit Demandeur est le créancier pour valable considération et est le porteur de bonne foi.

"Que toutes telles transactions entre le dit Défendeur et le dit Alexis Mousseau n'ont pu avoir lieu par suite de conventions faites entre eux que pour sauver et conserver le crédit du dit Défendeur et ce hors la connaissance du Demandeur.

"Que vu tout ce que ci-dessus allégué, il résulte que le dit Défendeur est de mauvaise foi en sa dite exception qui est injuste, vexatoire et mal fondée."

Les parties allèrent à l'enquête et le dix huit Décembre, 1862, elles furent entendues au mérite et priées en même temps de soumettre leurs autorités et propositions par écrit. Voici ce que *M. Girouard*, pour le Défendeur, soutenait dans le mémoire qui suit :—"Plusieurs questions sont soulevées par les défenses du Défendeur. D'abord, le billet qui fait la base de la présente poursuite a-t-il été renouvelé par des billets, subséquents à l'échéance du billet originaire, avec M. Mousseau qui en était alors le porteur. Il est bien admis que M. Mousseau, avant de recevoir le paiement du Demandeur a accepté des billets à l'occasion du premier, et qu'il les retient encore ; il est aussi admis que le dernier de ces billets subséquents a été signé et livré le 13 Mai, 1862, payable à trois mois, c'est-à-dire, environ deux mois après l'institution de cette action, et que le Demandeur n'a retiré et payé le billet originaire de M. Mousseau que le 21 Juin, 1862, mais le Demandeur s'efforce de démontrer que tous ces billets subséquents n'étaient que des billets d'accommodement et non des renouvellements avec M. Mousseau. Il est bien vrai que la déposition de ce dernier n'est pas concluante en faveur du Défendeur, parceque après avoir formellement déclaré qu'en prenant les billets subséquents, *il entendait s'être engagé à renouveler les billets et à donner au Défendeur le délai qui y était mentionné*," il ajoute dans les questions qu'il ne les avait pas pris en renouvellement, dans le but de conserver l'endossement de M. Massue. Mr. Mousseau avait cependant aussi bien que le délai accordé par lui au faiseur du billet sans le consentement de l'endosseur déchargeait ce dernier comme le renouvellement. "D'ailleurs, la preuve du renouvellement du premier billet se trouve dans plusieurs lettres de M. Mousseau à M. Crebassa. A propos du dernier des billets subséquents, celui du 13 Mai, 1862, M. Mousseau écrivait à M. Crebassa :—"En réponse à la vôtre du sept, je vous informe que je *renouveler encore votre billet* pour 3 mois, avec la condition que vous en paierez au moins la moitié dans le mois d'Août ; veuillez me renvoyer le billet à temps avec les intérêts qui sont de \$25—signé Alex. Mousseau." Or non-seulement ce billet du 17 Mai, 1862, a été pris par M. Mousseau à ces conditions, mais il en est de même des autres. Tous ont été pris aux mêmes termes ; M. Mousseau l'avoue formellement et ne l'a pas nié ensuite. Il semble que le renouvellement, qui est le mot consacré dans cette lettre, est prouvé de la manière la plus formelle. Maintenant, quel est l'effet de cette convention. On doit donner à ce mot comme aux autres le sens ordinaire et général. Renouveler ou innover implique de suite l'idée de novation, et le Défendeur

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soutient humblement que le renouvellement emporte novation du billet originaire, "L'acceptation," dit *Massé, Droit commercial*, tome 5 page, 274, No. 295, où la question est discutée au long, "de billets donnés en renouvellement ou en remplacement de billets antérieurs non payés à l'échéance opère novation de l'obligation; la créance qui résultait des billets est éteinte par le seul fait de l'annulation de ces billets, et se trouve remplacée par celle dont les nouveaux billets sont le titre."—Voir aussi *Chitty on Bills*, éd. 1849, page 181. Mais dit le Demandeur, M. Mousseau a toujours gardé par devers lui le billet originaire? Oui, il l'a gardé, comme il a aussi retenu tous les billets subséquents; mais il n'y a rien dans ce fait d'incompatible avec l'effet du renouvellement "Dans tous les cas," dit encore *Massé* page 287, no 308, "de ce que le porteur, tout en passant le montant de la lettre de change au débit du tireur, aurait gardé l'effet par devers lui, je ne crois pas qu'on puisse en conclure, ainsi que l'a fait un arrêt de la Cour de cassation du 27 Novembre, 1827, qu'il a conservé tous ses droits contre le tiré ou les endosseurs, et qu'aucune novation n'ait éteint les droits résultant de la lettre de change; la possession de l'effet par le porteur n'implique aucune contradiction avec les conventions qui en opérant la novation de l'obligation primitive, en auraient annulé le titre, et qui auraient par suite libéré les co-obligés, à qui ce titre cessait d'être opposable."

"Mais en supposant même qu'il n'y a pas eu de novation, le Défendeur doit avoir le bénéfice du délai, que le 13 Mai, 1862, Mousseau alors porteur lui accorda en acceptant son billet à trois mois pour le même montant.

"Enfin, le Défendeur soutient encore que quand bien même, il n'y aurait pas eu de novation, le Demandeur aurait dû offrir par son action tous les billets subséquents retenus par M. Mousseau, surtout, celui du 13 Mai, qui n'était pas encore échu. "In an action," dit *Chitty on Bills*, page 176, "for the original demand, if it appear in evidence that a negociable bill or note was given, the Plaintiff cannot recover without producing the instrument, or proving that it is in his possession or control, or proving that it was destroyed." La raison que donne Lord Ellenborough de cette règle est "that, as the note, for anything that appeared in evidence was in existence, it might be still in circulation, so that the Defendant might be subjected twice to the payment of the same demand; without therefore proving the note destroyed, the Plaintiff was not entitled to recover." *Chitty on Bills*, éd. 1849, page 176, note (*). Mais, répond le Demandeur, comment puis-je produire ces billets subséquents, et être aussi responsable du délai accordé au Défendeur par M. Mousseau avant de l'avoir payé, puisque je ne savais rien des transactions qui ont pu avoir lieu entre eux. A cela, le Défendeur prétend d'abord que le Demandeur connaissait une partie suffisante de ces transactions, et cela de la bouche même de M. Mousseau. A ce sujet, voici ce que M. Massue avoue dans sa déposition en parlant d'une entrevue qu'ils ont eue à propos de ce billet originaire en Novembre, 1861: "J'ai offert à M. Mousseau de lui payer le billet qui avait été protesté. D'abord, "M. Mousseau m'a dit, c'est bien, je vais recevoir l'argent ou prendre votre propre billet en paiement; ensuite, M. Mousseau me dit; J'ai accordé délai à M. Crébassa jusqu'au premier Janvier, mil huit cent soixante et deux; atten-

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"de z jusque là, vous avez une chance à courir que M. Crebassa paie le billet, "c'est-à-dire le billet poursuivi." Puis, lui étant demandé si M. Mousseau ne lui avait pas raconté comment il avait accordé ce délai à M. Crebassa, il répond : "M. Mousseau ne m'a pas donné aucune connaissance des affaires qu'il avait "avec M. Crebassa, *excepté qu'il m'a dit que M. Crebassa lui avait donné son "billet payable au mois de Janvier, mais que M. Mousseau conservait toujours "le billet protesté et poursuivi en cette cause comme garantie."*

"Admettons même que le Demandeur n'a jamais eu connaissance des transactions du Défendeur avec M. Mousseau, le Défendeur soutient, comme dernière proposition légale, que même dans ce cas, il peut lui opposer le délai qui lui a été accordé, le défaut de production des billets sub-séquents et généralement toutes les exceptions et défenses qu'il aurait pu invoquer, s'il eut à répondre à l'action de M. Mousseau lui-même. Il faut en effet remarquer que le paiement opéré par M. Massue n'a eu lieu qu'après l'échéance du billet poursuivi en cette cause, et même après la livraison du billet du 13 Mai, 1862, et l'octroi du délai; que M. Massue n'était qu'endosseur par accommodement et simple caution solidaire de M. Crebassa. En conséquence, M. Crebassa n'avait aucune responsabilité personnelle vis-à-vis de M. Massue que comme le subrogé dans les droits du porteur, M. Mousseau, par le paiement qu'il lui aurait fait en temps utile du billet; et évidemment, si les droits du porteur étaient éteints ou suspendus lors de paiement, tel paiement était nul et sans effet. Toutes les autorités, tant anglaises que françaises, paraissent d'accord sur ce point, d'ailleurs de droit commun.

"So," dit *Chitty on Bills*, page 391, "an endorser or party who transferred a "bill or note returned to him, and called upon to take it up, should also perfectly assure himself, not only that the party applying for payment is the lawful "holder of the bill, but also that there have not been any laches by such holder "or any other party; for if there have been laches, and prior parties have been "thereby discharged, an indorser, by unnecessarily paying the bill, will not "revive the liability of the prior parties, or be enabled to recover from them," "for," dit *Story on Bills*, page 552, § 423, "he has no right, by such payment, "to place them in a worse situation than they would otherwise have been." "L'endosseur," dit *Persil, de la lettre de change*, page 330, "qui rembourse le "porteur a les mêmes droits que ce dernier. Cette disposition s'explique tout "naturellement par la nouvelle position que lui crée l'opération du remboursement. L'endosseur tient alors la place du porteur à l'égard de son cédant, de "tous les endosseurs antérieurs et du tireur; puisqu'il le remplace, il a tous les "mêmes droits, mais il n'en possède pas de plus grands."

"Voir aussi *Pardeau, Droit Commercial*, vol. 1er, page 421; *Locré, Esprit du "code de Commerce*, page 518, art. 164." L'affrénay pour le Demandeur prétendit que la preuve ne faisant pas voir que le Demandeur eut connaissance des transactions intervenues entre le Défendeur et Mousseau, il devait nécessairement recouvrer du Défendeur le montant du billet qu'il avait été forcé de payer pour lui comme son endosseur. Que le Défendeur était tenu d'indemniser le Demandeur de toutes les conséquences pécuniaires de cet endossement, et que les autorités citées par le Défendeur ne pouvaient recevoir aucune application

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dans le cas d'un endosseur qui avait été obligé pour se soustraire aux poursuites du porteur, de payer lui-même le montant d'un billet protesté. Que d'après les circonstances de cette cause, rien ne faisait voir que Mousseau eût commis des irrégularités (laches) telles qu'elles fussent de nature à rejailir sur les droits du Demandeur comme endosseur qui avait payé de bonne foi et dans la vue de protéger son crédit et d'éviter des frais inutiles.

Que le Défendeur par ses lettres avait reconnu la validité de la réclamation du Demandeur et n'avait jamais prétendu avoir obtenu aucun délai pour le paiement du billet endossé pour le Demandeur.

Le 18 Février, 1863, jugement fut rendu en faveur du Demandeur dans les termes suivants :

" La Cour, après avoir examiné la preuve et pièces produites, vu les admissions faites par les parties en cette cause, vu aussi les objections prises par le Défendeur, durant l'enquête à certaines parties de la preuve produite, lesquelles objections ont été par les parties réservées pour l'audition finale sur le mérite de cette cause, et vu de plus la motion du Défendeur faite le dix-sept Décembre, mil huit cent soixante et deux, pour rejeter la preuve à laquelle les objections ont été ainsi faites et réservées, et ayant entendu les parties sur le mérite de cette action, et sur la dite motion ; rejette la dite motion, avec dépens, et considérant que le Défendeur n'a pas établi par une preuve légale et suffisante que le billet donné par le Défendeur à Alexis Mousseau mentionné dans les plaidoyers en cette cause du sept Octobre, mil huit cent soixante et un, ou les billets subséquents mentionnés dans l'exception produite et plaidée par le Défendeur à l'encontre de la présente action, ont été donnés en renouvellement du billet qui fait la base de la présente poursuite en date du 4 Avril, mil huit cent soixante et un, et échu le huit Juillet de la même année.

" Considérant qu'il n'est pas prouvé par une preuve légale et suffisante que le billet donné par le Défendeur au dit Alexis Mousseau, porteur et propriétaire du billet qui forme la base de la présente action, ou les billets subséquents mentionnés dans la dite exception péremptoire produite et plaidée par le Défendeur à l'encontre de la présente poursuite, a ou ont opéré aucune novation, paiement ou extinction du billet qui forme la base de la présente action, mais, vu qu'il est prouvé au contraire que les dits billets ont été donnés pour la commodité et pour l'accommodation du Défendeur, et accordèrent seulement un délai pour le paiement du montant du dit billet en date du quatre Avril, mil huit cent soixante et un, devenu dû et payable le 8 Juillet, mil huit cent soixante et un, et qui forme la base de la présente action.

" Considérant que toutes les transactions relatées dans l'exception du Défendeur sont intervenues entre le Défendeur et le dit Alexis Mousseau à l'insu du Demandeur, et que le dit Alexis Mousseau a toujours été et a continué d'être porteur et propriétaire du dit billet du quatre Avril, mil huit cent soixante et un, et ce jusqu'au paiement du dit billet en dernier lieu mentionné par le dit Demandeur.

" Considérant que le délai accordé au Défendeur par le dit Alexis Mousseau et les billets pris et reçus par lui pour l'accommodation du Défendeur ont nullement changé ou innové le billet qui forme la base de la présente poursuite ou

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libéré ou déchargé le dit Demandeur du billet du quatre Avril mil huit cent soixante et un, donné et endossé par icelui.

" Considérant que le paiement du dit billet du quatre Avril, mil huit cent soixante et un, par le dit Demandeur comme endosseur sur icelui billet est, et était un paiement légal auquel le dit Demandeur était tenu et obligé en droit comme tel endosseur.

" Considérant que vis-à-vis de l'un et de l'autre, comme faiseur et endosseur sur le dit billet du quatre Avril, mil huit cent soixante et un, le Défendeur était, et est le débiteur principal et qu'il ne lui est pas loisible de faire valoir une défense telle que produite en cette cause, et pour réussir, il lui aurait fallu prouver qu'il avait précédemment payé le dit billet, ou que le dit billet a été formellement et légalement renouvelé, ou que novation en était intervenue entre lui et le dit Alexis Mousseau, ce que le Défendeur a entièrement failli d'établir par une preuve légale et suffisante, a débouté et déboute la dite exception produite par le Défendeur, et procédant à juger sur le mérite de cette action et demande et vu que le Demandeur a prouvé les allégués essentiels de sa déclaration, condamne le Défendeur à payer au Demandeur la somme de cinq cent deux dollars et cinq centins du cours actuel de la Province du Canada, savoir : la somme de cinq cent piastres montant du dit billet en date du quatre Avril mil huit cent soixante et un, échu le huit Juillet, mil huit cent soixante et un, et qui forme la base de la présente action."

Lafrenage & Armstrong, avocats du Demandeur.

Girouard, avocat du Défendeur.

(P. R. L.) (D. G.)

MONTREAL 24TH JUNE, 1858.

No. 2100.

Mitchell.

vs.

Cousineau and Divers Opposants.

Held:—That seamen's wages are privileged and are payable in preference to the mortgages due upon a steamboat navigating Canadian Waters.

Several Oppositions having been filed in this cause upon the proceeds of the sale of the steamboat *Britannia* seized in this cause, by several of the crew employed on Board of said steamboat; the judgment of distribution was rendered in their favor, *nemine contradicente*; as follows:

40. To the opposant F. C. Deglendon, amount of his claim by privilege for wages as engineer on board of the boat seized and sold in this cause £16. 11. 8.

50. To the opposant Augustin Deglendon, amount of his claim for wages as sailor and fireman on board the said steamboat. £9. 8. 8.

60. To the opposants John Mitchell & Consors as representing the Plaintiff amount of their claim founded on a deed of mortgage of the said steamer. . . .

A. & W. Robertson attorneys for Plaintiffs.

P. R. L.

ST. HYACINTHE, JANUARY, 1863.

Coram McCORD, J.

No. 279.

Rimmer vs. Dame Flavie Bouchard et al.

SIMULATED DEEDS—FRAUD AGAINST CREDITOR.

In a contestation by a creditor of the title of the wife of his debtor, to a piece of land, the wife having answered interrogatories *sur faits et articles* that she had paid for the land out of savings made before marriage, it was held that these savings formed part of the community between husband and wife, and were applicable to the payment of the debts thereof.

One of the circumstances which throws ordinarily most light on the bad faith of third parties, is the notoriety of the distress of the debtor. Whoever makes with him an agreement prejudicial to his creditors, will have difficulty in maintaining his exception of good faith. At any rate the presumption will be against him until he has proved that the notoriety had not reached him.

It is an indication of fraud in the alienation of property by a debtor, that the employment of the price of the alienation, does not appear.

When the books of a trader do not show any entries of a transaction in question, or payments on account thereof, there is a legal presumption against its truth.

A deed of sale by a debtor to his brother-in-law, and another by his brother-in-law to his wife will be set aside at the suit of a creditor as simulated and fraudulent where there is no valid consideration for such sale.

This was an action to set aside certain deeds of sale made between defendants in fraud of creditors.

Défense au fonds en fait

McCord, J., in rendering judgment stated the facts as follows, and said : Morgan, one of the defendants, being a trader became bankrupt and unable to meet his engagements; his insolvency was notorious; at this time he was possessed of certain lots of land in the Township of Acton.

Being so insolvent, Morgan on the 15th of March, 1859 sells these lots, (for which several years before he had paid £500, and the value in the meantime having greatly increased from the proximity of the mines) to one Lahaye for £400 cash.

This Lahaye turns out to be Morgan's brother-in-law.

No proof whatever that these £400 went into the estate of Morgan, for the benefit of his creditors.

Lahaye at the time of this purchase from Morgan in the spring of 1859, is proved to be in pecuniary difficulties, paying debts by small instalments and renewing his bills. In the autumn of that year Lahaye calls a meeting of his creditors and compounds.

Shortly after this sale by Morgan to Lahaye on the 6th June, 1859, the defendant, Flavie Bouchard, brings an action en séparation de biens against her husband Morgan and subsequently on the 25th June, 1859, she obtains her judgment en séparation de biens, a praticien is named to ascertain her rights and reprises, &c., which are represented by him to be nil.

The 4th July of the same, year 1859, Lahaye sells the lots in question to defendant, Flavie Bouchard, for £620, which consideration is stated in the deed to have been paid in cash by her. These lots Mme. Morgan then held in her own name, and put Morgan's creditors at defiance.

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et al

Where did Mrs. Morgan get the means of paying the £620, price of the lots? She had no reprises. She says in answer on *faits et articles*, they were from savings made while she was in trade, before she was married to Morgan, years ago.

If this be true, these savings must have formed part of the Communauté, and were applicable to the payment of the debts thereof.

The Defendant relies for his defence on the statement, that the transaction between Morgan and Lahaye was in good faith as regards the latter, a third person, and thus consequently it could not be set aside.

Was Lahaye in good faith?

Did he know of Morgan's insolvency when he transacted with him? It is proved that Morgan's insolvency was *notoire* at the time of sale by Morgan to Lahaye.

Is it likely that Lahaye, Morgan's brother-in-law, would be ignorant of it.

Chardon, Vol. II, No 208.

Pothier, De la vente, No 320.

It is no where shown that the proceeds of sale to Lahaye or those from the sale to Defendant were applied towards the payment of the creditors of either *emploi*.

Chardon, Nos 279 and 280.

Nor is it *probable* or *credible* that Lahaye in such embarrassed circumstances, as he is proved to have been under, could have paid down £400 in cash?

There being no entry as proved in Lahaye's books of the purchase from Morgan, and payment thereof, the *presumption* (LEGAL) is against the truth of any such transaction on his part, and Morgan's estate showing no book with entries or receipts of the money, the legal presumption is equally against him.

Toullier, Vol. VI, No. 355.

Chardon, Vol. II, No. 220-No. 235.

To this, add the legal presumption of fraud, arising out of transactions between relations and the want of any proof of "bona fides" on the part of Lahaye and defendant, I confess that there remains little doubt in my mind that the whole transaction was simulated.

I may be mistaken, a *human* Judge cannot enter into the breasts of men and see the rectitude of their intentions; he can only guide his judgment by the facts of records, and the deductions to be drawn from these and by the application of the legal maxims and decisions laid down in the Law.

I am therefore of opinion that the plaintiff is entitled to his judgment, which will be registered as follows:

"The Court having heard the parties by their respective counsel upon the merits of this cause, examined the proceedings, proof of record and having deliberated, considering that the plaintiff hath established by sufficient and legal evidence the material allegations of his declaration, and more particularly that the sale of the real estate mentioned and described in the declaration of the plaintiff in this cause from the said Richard J. Morgan, one of the said defendants, to the said Octave Lahaye, another of the said defendants, by deed passed before Mrs H. J. Moyer

and his colleague, public Notaries, on the fifteenth day of March, one thousand, eight hundred and fifty-nine, and the sale and transfer of the said identical property by the said Octave Lahaye to the said Dame Flavie Bouchard, another of the defendants in this cause, and wife of the said Richard J. Morgan, by deed passed before Maître H. J. Meyer and his colleague, public Notaries, on the fourth day of July one thousand eight hundred and fifty-nine, were so made and executed fraudulently and collusively between the several parties thereto, with the view of placing the said real estate beyond the reach of the creditors of the said Richard J. Morgan, and of the said plaintiff in particular; and further, considering that at the time of the pretended sale of said real estate to the said Octave Lahaye by the said Richard J. Morgan, he the said Richard J. Morgan, was the debtor of the said plaintiff to a considerable amount, and that the said plaintiff did give and grant such credit to the said Richard J. Morgan upon the faith and representation of said Richard J. Morgan, that the said real estate was the property of him the said Richard J. Morgan; and further considering that it does not appear from the evidence in this cause that the pretended price or consideration money of the said two sales was made available towards the payment of the creditors of either party, the Court doth declare the said two deeds of sales, to wit, the one from the said Richard J. Morgan to the said Octave Lahaye, and the other from the said Octave Lahaye to the said Dame Flavie Bouchard, to be simulated and made in fraud of the creditors of the said Richard J. Morgan and of the said plaintiff in particular, and doth declare the said sale and transfer of the said real estate to be null and void as respects the said plaintiff, and that the said real estate mentioned and described in the said deeds of sale and in the declaration of the plaintiff in this cause, as follows, to wit: "All those certain lots of land held in the tenure of free and common socage known and distinguished as

" lots number twenty-six, twenty-seven, twenty-nine and thirty, situated in the third range of lots in the township of Acton, in the county of Drummond, in the district of St. Francis, also lot number twenty-eight situated in the fourth range of lots in the said township of Acton, containing each of the said lots about two hundred acres of land, more or less, as the same are described by bounds in the original letters patent from the crown granting the said lots twenty-six, twenty-seven, twenty-nine and thirty to John McKindley, his heirs and assigns, and the said lot number twenty-eight to Louisa Bundfield, her heirs and assigns, and also all and singular the members and appurtenances thereunto belonging," have always been and still are the property and in possession of the said Richard J. Morgan, and affected and liable towards the said plaintiff for the payment of the sum of four hundred and sixty dollars, and ninety-five cents currency with interest upon the sum of two hundred and fourteen dollars and fifty-five cents from the nineteenth day of September one thousand eight hundred and fifty-nine; upon the sum of one hundred and eighty-three dollars and sixty-five cents from the twenty-eighth day of October one thousand eight hundred and fifty-nine; and on two dollars and fifty cents from the sixth day of November one thousand eight hundred and fifty-nine; until actual payment of the said sum of four hundred and sixty dollars and ninety-five cents, due under and in virtue of the judgment obtained by the said plaintiff against the said Richard J. Morgan in the

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Superior Court in the District of Montreal, on the thirty-first October one thousand eight hundred and sixty, and the judgment obtained by the Bank of British North America against the said Richard J. Morgan in the Circuit Court for the District of Montreal on the twenty-ninth day of November one thousand eight hundred and fifty-nine and transferred to the said plaintiff by act passed before Mtre. D. Smith and his colleague public Notaries on the fifth day of June one thousand eight hundred and sixty : and finally the Court doth condemn the said Defendants jointly and severally to pay the costs of this action distrains in favor of Messrs Laframboise & Papineau, the attorneys of the said plaintiff."

Judgment for Plaintiff.

Laframboise & Papineau, for Plaintiff.

W. A. Bovey, for Defendants.

Sicotte & Chagnon, Counsel for Defendants.

(M. L.)

CIRCUIT COURT.

MONTREAL, 30TH JUNE, 1863.

Coram SMITH, J.

No. 780.

Matthews vs. Sénécal.

Held:—Where a moveable had been leased by the owner and the lessee had sold it to a third party, an action *en revendication* by the lessor to recover it back will be maintained, although the possessor may have purchased in good faith.

Per Curiam.—This was an action *en revendication* brought by the Plaintiff to recover possession of a Sewing Machine. The Defendant pleaded that he had purchased the machine in good faith. The person from whom he bought it was a merchant tailor, and he the Defendant, had every reason to believe that it was this man's property. But the Plaintiff answered that this was not the case; that the person in question had possession of it only under a lease.

It was not an ordinary lease, but an agreement, that at the end of a certain time, unless a stipulated sum were paid, the property was to vest in the original possessor. The conditions of the lease not having been complied with, there was no right of property in the person to whom the article had been leased.

The owner stood clothed with all his rights, and the Defendant could not prevent him from regaining possession of his property.

It was a hard case, however, for the Defendant, who had paid \$40 for the machine. But the Plaintiff was entitled to recover, and judgment must be given in his favor with costs. Otherwise, the Court would be departing from the principles of justice.

Judgment for Plaintiff.

B. Devlin, for Plaintiff.

Fabre, Lesage & Jetté for Defendant.

(J.L.M.)

MONTREAL, 1ST DECEMBER, 1862.

Coram SMITH, J.

No. 1264.

Wilson vs. The State Fire Insurance Company.

Held:—1. That an Assignee of a Policy of Insurance against loss by fire may recover, without furnishing any statement of loss whatever.

2. That the failure of the assured to disclose the existence of a fulling mill under the same roof as the buildings insured and destroyed by fire is not a material concealment or misrepresentation, although it be proved that had the disclosure been made the premium of Insurance would have been much in excess of that charged; when the Plaintiff's witnesses concur in stating that the risk was not thereby increased.

3. That a condition in a policy that no action can be brought for the recovery of the loss, after the expiration of 6 months from the occurrence of the fire, is inoperative as a bar to an action instituted after that period.

This was an action to recover the sum of £584 under a Policy of Insurance granted by the Beacon Fire & Life Assurance Company (now represented by the Defendant) of a grist and saw mill and their machinery, the property of one Flavien Lavallée, and assigned to the Plaintiff.

The Defendant pleaded, under special denial of the allegations of Plaintiff's declaration, that true it was the Beacon Life & Fire Assurance Company executed the deed poll, or policy of insurance filed in the cause as the Plaintiff's exhibit number one, and that the Defendant assumed such Policy and received the premium thereon for the period in the Plaintiff's declaration stated, but that no inventory, detailed specification or estimate of the loss or damage pretended to have been suffered by the destruction by fire of the property insured by such deed poll or policy of insurance, such as required by the conditions endorsed on such deed poll or policy of insurance, nor any inventory, statement, specification or estimate whatever of such pretended loss or damage, had ever been delivered or furnished to the said Company, Defendant, or to any one to whom the same might or could be delivered or furnished under the said deed poll or policy, and conditions, nor had any proof of such pretended loss or damage been ever made or tendered, although the same had been frequently demanded.

And further, that when the said deed poll or policy of Insurance was executed, the fact of the existence of the fulling mill, where the fire originated, and the near proximity of which to the property insured caused the destruction of the latter was not disclosed to the said Beacon Life & Fire Insurance Company, and did not and does not appear in the plan referred to in the said deed poll or policy, purporting to show the precise state and condition of the premises at the time the insurance thereof was effected, and which was furnished by the said Flavien Lavallée in whose favour such deed poll or policy was granted, and that the existence of such fulling mill was never, in fact, known either to the said Beacon Life & Fire Assurance Company or to the said Company Defendant until after the occurrence of the said fire.

And further, that the present action was not commenced within six months after the said pretended loss or damage occurred.

R. Lafamme, for plaintiff, contended that in a case like the present where

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the value of buildings formed the bulk of the claim, the failure to produce a detailed statement of loss was of no consequence. Then, as to the charge of concealment or misrepresentation, he thought the evidence established that whilst the policy was running, the agents of the Plaintiff had been informed by Lavallée of the existence of the fulling mill, and that they made no objection, and that under any circumstances, as the Plaintiff's witnesses concurred in stating that the fulling mill was really no additional risk, the question of misrepresentation was not material. And, as to the six months prescription invoked by the defence, he argued, that it was entirely opposed to the law of the land and could not therefore be enforced.

Bethune, for Defendant, relied on the entire absence of any statement of loss whatever as fatal to the Plaintiff's case, and also contended, that as the Defendant had proved that the existence of the fulling mill had never been disclosed and that had it been, the premium would have been much in excess of that charged, there could be no doubt as to the material character of the misrepresentation, and that the concealment of the fact of the existence of the fulling mill so materially affected the contract between the parties as to render it absolutely null and void. He further contended, that the limitation of 6 months for the bringing of the action was an express condition of the policy, and one that ought, under all the circumstances, to be enforced in the present case.

SMITH, J.—This action was brought by Wilson, assignee of a policy of insurance, from one Lavallée. Lavallée was proprietor of certain mills,—saw mills and grist mills. He effected insurance upon these separately, and upon their contents. The parties continued under the contract till the property was all destroyed by fire. The Defendants being called upon to pay, pleaded, first, that no sufficient statement of loss was given. Second, that there was a wilful concealment and misrepresentation of property insured, by not informing the Insurance Company that there was a fulling mill under the same roof with the grist mill. Third, that the action should have been brought within six months. The answer to the first plea was, that the property consisted mainly of machinery, of which a detailed description was not necessary. The second point raised the substantial objection of misrepresentation. It was perfectly clear, according to the evidence, that no mention was made of the fulling mill as being under the same roof with the grist mill. It was clearly the duty of the insured to make this known. It was contended that mention was made of the fact, but the evidence on this head was unsatisfactory. Then, assuming that this ought to have been disclosed, the question was, was it material? All the witnesses brought up for the Plaintiff swear that it was not material. Therefore, whatever the opinion of the Court might be, it was bound to decide according to the testimony of persons well acquainted with the subject. As to the third plea, it could not be maintained, as there was no prescription of six months in the law of the land, which was the law the Court was bound to follow. Judgment must therefore go for Plaintiff.

R. & G. Lafamme, For Plaintiff.

Bethune & Dunkin, For Defendant.

(S.B.)

Judgment for Plaintiff.

MONTREAL, 25 JUIN, 1863.

Coram SMITH, J.

No. 2123

*Massue vs. Crebassa, et Crebassa, Opposant.*Jugé:—1^o Que sur une saisie-exécution, aucun commandement de payer n'est nécessaire.2^o Que le débiteur exécuté est tenu d'alléguer et prouver qu'il a des biens dans les limites du district où le jugement a été rendu contre lui, s'il veut se prévaloir des dispositions de la 40^{ème} Section du Chapitre 88 des Statuts Refondus pour le Bas Canada.

Le Défendeur dans son opposition afin d'annuler la saisie mobilière faite en cette cause, prétendait qu'aucun commandement de payer ne lui avait été fait en vertu du Writ, alias Fi: Fa: de Bonis émané contre ses biens meubles et adressé au Shérif du District de Richelieu, dans les limites duquel District le Défendeur réside. Le jugement final avait été rendu à Montréal, dans le District de Montréal et un Writ de Bonis et de Teris, ayant été préalablement émané, fut rapporté par le Shérif du District de Montréal qui déclara que le Défendeur ne possédait aucuns biens meubles ou immeubles dans les limites du District de Montréal.

De plus, le Défendeur prétendait par son opposition que ses biens auraient dû être discutés dans le District de Montréal: mais il n'en indiquait aucun.

Il prétendait encore que le Writ d'alias Fieri Facias de Bonis était nul, vu que par la Section 1^{ère} du Chapitre 85 des Statuts Refondus du Bas Canada, tout Writ d'exécution émané de la Cour Supérieure doit l'être tant contre les immeubles que contre les meubles en même temps et par un même Writ.

Des admissions furent données par le Demandeur comme quoi aucun commandement de payer n'avait été fait au Défendeur en aucun temps.

Le Demandeur cita les autorités suivantes, pour établir que cette demande de payer n'est plus nécessaire en Bas-Canada; 2 L. C. Reports, page 148, Lee vs. Lampson et Divers, Volant vs. Drapeau, Pozer vs. L'Espérance, &c., et pour établir que le Défendeur contre lequel un jugement a été rendu dans un district autre que celui de sa résidence est tenu de prouver qu'il a des biens, s'il veut se prévaloir des dispositions de la loi, S. R. B., Ch. 83, Sec. 40—12 L. C. Reports, page 403, Rose vs. Coutlée, et enfin pour établir qu'un Writ de Bonis peut émaner de la Cour Supérieure sans qu'il soit nécessaire au créancier de le faire émaner contre les immeubles en même temps et que le changement introduit par l'ordonnance de 1785 qui prescrit la saisie des meubles et des immeubles par la même exécution, n'a jamais eu lieu dans ce district, mais qu'une pratique contraire a prévalu et qui a été sanctionnée par la Jurisprudence, 2 L. C. Reports, page 58.

Per Curiam.—Les moyens d'opposition sont futiles et l'opposition est renvoyée avec dépens.

La Frenaye & Armstrong, Avocats du Demandeur.

Girouard, Avocat de l'Opposant.

(P. N. L.)

MONTREAL, 30 JUIN, 1863.

Coram MONK, J. A.

No: 1866,

Poirier vs. Tassé et al.

Jugé:—Que l'action résolutoire pour défaut de paiement du prix de vente peut être exercée en aucun temps contre le tiers entre les mains duquel la chose vendue est passée.

Cette action était portée par le Demandeur pour la résolution d'un acte de vente qu'il avait consenti le 10 *Avril* 1833 en faveur de l'un des Défendeurs Vincent Tassé; à défaut du paiement d'une balance de \$166 et pour obliger le tiers détenteur Jérémie Gratton à délaisser la propriété vendue.

Le Défendeur, Jérémie Gratton avait acheté cette propriété de l'autre Défendeur Tassé, et étant tous deux poursuivis par le Demandeur et n'ayant pas contesté la demande: le jugement de la Cour est motivé comme suit:—

La Cour après avoir entendu les parties par leurs avocats sur le mérite de cette cause *ex parte*, les Défendeurs n'ayant pas plaidé à cette action et ayant été forclos de le faire, examiné la procédure, pièces produites et preuve et avoir sur le tout délibéré, déclare résolu et résilié, l'acte de vente du dix *Avril* mil huit cent trente trois, passé devant Mtres. P. J. Filiatrault et son confrère notaires, et fait par le Demandeur et Elizabeth Labelle son épouse, au Défendeur Vincent Tassé, vu le refus et négligence par les dits Défendeurs de payer la balance en capital et intérêt du prix de vente du dix *Avril* mil huit cent trente trois, c'est à dire: la somme de cent soixante six piastres cours actuel, ordonne que le demandeur soit réintégré dans la propriété et possession du dit emplacement et dépendances de même que si la dite vente n'avait jamais eu lieu, condamne le dit Défendeur Vincent Tassé à rembourser et payer au dit Demandeur la somme de cinq cent quarante piastres courant pour lui tenir lieu des fruits et revenus du dit emplacement depuis le dit jour dix *Avril* mil huit cent trente trois, à venir jusqu'au seize mars mil huit cent soixante trois.

Déclare les diverses sommes qui ont été payées par le dit Défendeur Tassé à compte du dit prix de vente du dix *Avril* mil huit cent trente trois plus que compensées par la dite somme de cinq cent quarante piastres représentant les fruits et revenus du dit Immeuble perçus par les Défendeurs successivement depuis le dit Jour dix *avril* mil huit cent trente trois, déclare le présent jugement contre le dit Vincent Tassé commun au dit Défendeur Jérémie Gratton et condamne le dit Jérémie Gratton comme détenteur du dit emplacement à le délaisser et en abandonner la possession au dit Demandeur sous quinze jours de la signification du présent jugement: si mieux n'aiment toutefois les dits Défendeurs payer au dit Demandeur dans le dit délai de quinze jours la dite balance en capital et intérêt du dit prix de vente, savoir: la somme de cent soixante six piastres du dit cours actuel de la province du Canada, avec intérêt sur celle de quatre vingt piastres dit cours à compter du premier mars mil huit cent soixante trois jusqu'au paiement, et aux dépens. (1)

Bélanger et Decnoyers, avocats du Demandeur.

Loranger et Frères, avocats des Défendeurs.

P. B. L.

(1.) *Vide* 1 L. C. Jurist, p. 106.

4 L. C. Jurist, p. 122.

MONTREAL, 31st DECEMBER, 1862.

Coram SMITH, J.

No. 2018.

Egert et al., vs Laidlaw.

Held:—That in a case of a Petition by a defendant to set aside a writ of *Capias ad Respondendum*, on the ground that the statements of fact sworn to in the affidavit are untrue, the *onus probandi* is entirely on the Defendant to prove that what is so sworn to is false.

This was a Petition by a Defendant to set aside a writ of *Capias ad Respondendum*, on the ground that the statements of fact sworn to in the affidavit were untrue, and specially the assertion that the Defendant had in effect, informed one of the Plaintiffs that he had put his property beyond the reach of his creditors.

Bethune, for Defendant, relied for the success of the application on the *prima facie* case made out by the Defendant, that he had not to the knowledge of the witnesses, who were persons intimately acquainted with the Defendant and his business, in any way secreted or made away with his property, and the entire absence of evidence on the part of the Plaintiff; contending that such *prima facie* case plainly threw the *onus probandi* on the Plaintiffs to establish the truth of the allegations contained in the affidavit.

Per Curiam.—The practice here and in England, whence we have borrowed the procedure, is for the Defendant to prove the falsity of the Plaintiff's statements. I therefore reject the petition for want of proof.

Petition rejected.

Bethune & Dunkin, for Petr.

Kerr & Nagle, for Plff.

(S.B.)

CIRCUIT COURT, 1862.

MONTREAL, 27th SEPTEMBER, 1862.

Coram BADGLEY, J.

No. 94.

Kearney vs. McHale alias Collins, and Pariseault, T. S.

Held:—That a writ of *Saisie-Arrêt* after judgment, in a case where the Defendant has left the District of Montreal since the service of the original process, may be legally served on a clerk in the office of the clerk of the Circuit Court at Montreal.

Per Curiam.—This was the case of a *Saisie-Arrêt* after judgment, in which a question has been raised as to the sufficiency of the service on the Defendant. It would appear from the proceedings of Record that since the service of the original summons the Defendant has left the district and cannot be found therein, and, in consequence the Bailiff has served the attachment in the Clerk's office, by leaving it with one of the clerks employed there. After consultation with my brother judges, we all concur in thinking that the service is sufficient, and judgment will go therefore maintaining the *Saisie-Arrêt*.*

Judgment maintaining *Saisie-Arrêt*.

McGee & Walsh, for Plaintiff.

(S.B.)

* *Vide* Ch. 83 Cons. Stat. of L. C., Sections 5, 8 and 64. [Reporter's note.]

MONTREAL, 31ST MARCH, 1863.

Coram SMITH, J.

No. 2714.

Miller vs. Snell.

Held:—That although there may be a doubt about the kind of action to be brought against a debtor, yet the Plaintiff can recover on a balance of account admitted by the Defendant to be due him.

Per Curiam—Plaintiff is proprietor of rolling mills, and defendant received from him pig-iron which he manufactured into sheets at a certain rate. The action was brought on an account shewing a balance due. There was some difficulty as to the kind of action that applied to the case. It appeared from the evidence however that the Plaintiff's nephew had rendered a balance of account to Defendant which the latter after some delay had admitted. Judgment would go for the amount of this balance only.

A. & W. Robertson, for Plaintiff.

S. Bethune, for Defendant.

(J.L.M.)

COURT OF QUARTER SESSIONS.

MONTREAL 27TH JANUARY, 1857.

Coram McCord, J.

Mullins.

and

Bellemare.

APPELLANT.

RESPONDENT.

Held:—That a conviction will lie against any one partner upon an information for selling liquors without a license.

The Appellant contended upon his appeal that he had been illegally convicted of the offence charged against the partnership of which he was a member; particularly on the ground that he was not liable *alone* for the acts of the partnership upon such an information:—

Per Curiam:—The Court is of opinion that the evidence of selling was sufficient and that a conviction will lie against any one partner of the partnership, on the principle that although the parties are jointly liable, the law treats all torts as several as well as joint and the party injured may proceed against all or any or more of them. (1.)

Conviction confirmed.

P. R. L.

SAME COURT.

SAME JUDGE.

Reynolds.

and

Durnford.

APPELLANT.

RESPONDENT.

Held:—That the Deputy Revenue Inspector can validly sign the Plaint or information in a prosecution for selling liquors without a license.

(1) 51 T. R. 649.—Bul. N. P. 189.—2 East, 569, 572.

IN THE QUEEN'S BENCH.

McCulloch et al.
and
Hatfield.

IN APPEAL FROM THE SUPERIOR COURT—DISTRICT OF QUEBEC.

QUÉBEC, JUNE, 1863.

Coram Aylwin, J.: Duval, J.: Meredith, J.: Mondelet, A. J.: Berthelot, A. J.:

MICHAEL MCCULLOCH, ET AL.,

Plaintiffs in the Court below.

and

A. HATFIELD,

*Defendant in the Court below,**Respondent.*

REVENDICATION—BILL OF LADING—COSTS.

Held:—That when a shipper of goods has delivered them to the captain of the ship which is to convey them, and the captain, after delivery, refuses to sign bills of lading according to the custom of trade, the shipper is entitled to sue out a writ of revendication to attach the goods in the hands of the captain as his property.

2. That after the captain has signed bills of lading and so far removed the shipper's cause of action, the action may still be returned into Court for the costs which have not been paid.

The Court of Queen's Bench rendering judgment, reversed that of the Court below:

The facts of the case fully appear from the remarks of the judges in Appeal.

AYLWIN, J., *dissentiens*.—This is an appeal from a judgment rendered by the Superior Court at Quebec, on the 5th of December, 1862, dismissing an action of revendication brought by the Appellants to recover possession of 1,500 barrels of flour.

The Appellants are merchants in Montreal, and the Respondent is the master of a sea-going vessel called the "General Williams."

It appears of record that the Appellants, on or about the 30th of May, 1862, under a contract of attachment with the Respondent, shipped on board the "General Williams" 1,500 barrels of flour, to be carried on board of that vessel from the port of Montreal to Liverpool, in England, and there delivered to the Appellants' agent. After the shipment, some difficulty arose respecting the terms of the bills of lading. The Appellants required the Defendant to acknowledge that the flour had been shipped "in good order and condition;" but this the Respondent refused to do, on the plea that the barrels containing the flour were not in good order. The "General Williams" left Montreal, and whilst she was in the harbour of Quebec, a negotiation was conducted by Mr. Holt, one of the Appellants' attorneys on behalf of the Appellants, and the Respondent, assisted by Mr. Tibbits, the ship's agent at Quebec, which ended in the Respondent signing and delivering, under protest, to the Appellants' agent, bills of lading to their satisfaction, for the flour in question. These bills of lading were signed and delivered on the 6th of June, 1863, and on the following day an attachment *en revendication* was made of the 1500 barrels of flour. The attachment was effected in consequence of a refusal on the part of the Respondent to pay a sum of \$43 as and for costs of suit claimed by the Appellants.

The writ having been returned into Court, the Appellants called on the

McCulloch et al. Respondent to plead to this action of revendication. The Respondent pleaded by peremptory exception, "That after the shipment of the flour in this cause
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The Respondent also filed a *défense au fonds en fait*. The Appellant replied generally. The whole contestation is as to the costs of the suit.

The parties gave the following admissions:

"It is admitted by the parties that the Plaintiffs shipped on board the 'General Williams,' whereof the Defendant was and is master, fifteen hundred barrels of flour, to be conveyed from the port of Montreal to Liverpool, and there to be delivered to the Plaintiffs' order:

"That such shipment took place at the time and place mentioned in the Plaintiffs' declaration:

"That it is the usage and custom of trade in this province for masters of vessels to sign bills of lading for cargo shipped, on request of shipper, before the vessel leaves port:

"That since the bringing of this suit, the said flour hath been delivered at Liverpool, pursuant to the Plaintiffs' order, less six barrels, for which the Defendant paid."

The case resolves itself to the question, whether the award of costs in favour of the Respondent be correct. To determine this, it is necessary to ascertain whether the attachment effected of the 1500 barrels of flour, was legal, and whether on the 7th of June, the Appellants had a right to revendicate. Their allegation was in the words of their declaration, "that the said Defendant as "such master as aforesaid, is now about to carry off the said goods and merchandizes in the said vessel, without signing bills of lading for the same, by "means whereof, without the benefit of a writ of revendication, to attach "the said 1500 barrels of flour, the said Plaintiffs may lose their said property or sustain damage." This allegation is met at the very outset with the fact that on the 6th June, the Respondent "had signed bills of lading for the same, "that the same were in the possession of the Appellants, and in consequence of the liability of the Respondent as such signer of the said bills of lading, were liable to indorsement, to any other party, there to be well and truly delivered at the said port of Liverpool, and to the order of the Plaintiffs.

The revendication then if legal, would have the effect to make the Respon-

dent answerable for the flour, at Quebec where judgment was rendered, instead of Liverpool, according to the terms of the bills of lading.

By the acceptance of the bills of lading, the Revendication became impossible, being inconsistent with the terms of the contract of the affreightment entered into with Appellants. By this contract, the Respondent was bound to convey the flour to Liverpool, but the Appellant on his side was bound to allow the shipment to be effected, and hence no attachment could issue which must interfere with the voyage. Admitting that the Respondent was bound to pay the costs of the suit, on the 7th June, the writ of revendication should never have been executed, the right and the remedy being merged, by the acceptance of the bills of lading. Though the writ of revendication ceased, the writ of summons would still subsist, and I would entitle the Appellant to obtain judgment for the costs, in the usual course of an ordinary suit.

Again, the Respondent by his *exception péremptoire* has set up the bills of lading and the delivery of the flour at Liverpool, unto the order of the Appellants. The Appellants, instead of admitting the facts alleged in the plea, and answering it specially, that the costs were unpaid, and that formed the only contestation, on the contrary, denied the facts alleged in the exception. The evidence then being clearly in favour of the Respondent and admitted by all parties, the costs should have been awarded against the Appellants, even supposing that there was a settlement of the cause of action as contended for by them, save and except the cost up to the day of the plea pleaded by the exception but with costs subsequently, the costs of the revendication being borne by the Appellant. The revendication was a high-handed measure which deserved to be reprobated.

The judgment of the Court below was to the effect that there was no settlement of the cause of action as contended for by the Appellants. This is a question of fact of considerable nicety: in such a case I would not undertake to alter the judgment, there being much to be said on both sides. The judgment of the Superior Court was—

"The Court, having examined the proceedings of record, the evidence adduced, and heard the parties by Counsel finally upon the merits: Considering that the defendant hath well and sufficiently established in evidence the material allegations of his plea of perpetual peremptory exception in this cause filed, and more particularly that after the issuing of the writ of revendication in this cause and before its execution the Plaintiffs accepted from the Defendant bills of lading for the flour mentioned in the said writ of revendication, and the said Plaintiffs have since received delivery of the same at Liverpool, in England. Considering that after the receipt by the Plaintiffs of the said bills of lading, there was no cause of action against the said Defendant, and there was a settlement of the cause of action: doth maintain the said plea, and dismiss the Plaintiffs' action with costs *distrains* in favor of Frederick C. Vannovous, Esquire, the Defendant's Attorney."

I concur in the view which was entertained by the Honorable Judge of the Court below in the entire, and I have therefore to dissent from the judgment which this Court is now about to render.

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MEREDITH, J., in rendering judgment in this case, said :—

The Appellants, about the 30th May, 1862, at Montreal, under a contract of affreightment with the Respondent, shipped on board of the "General Williams" of which the Respondent was master, 1500 barrels of flour, to be carried on board of that vessel from Montreal to Liverpool and there delivered to the Appellants' order. The flour was delivered on board of the "General Williams" by one Toussaint Lecompte, who proves that when delivering it, he told the mate of the ship to reject any that was in bad order; that none was rejected; that after the flour had been received, bills of lading were demanded two or three times, and were refused on the ground that the barrels were in bad order. The loading of the 1500 barrels was completed on the third of June, and one or two days afterwards the "General Williams" sailed from Montreal with the flour belonging to the Appellants on board, and without bills of lading having been signed. The "General Williams" reached the Island of Orleans, on her voyage home, on the 6th of June, and in the forenoon of that day, the Appellants sued out a writ of *saisie revendication*, under which the flour was attached on the following day. In the interval between the suing out of the writ and the execution thereof, and after much negotiation between the agents of the Appellants on the one side, and Respondent on the other, the latter signed bills of lading in due form, under protest, for the flour in question; and the bills of lading, so signed, were transmitted to the Appellants and retained by them.

Unfortunately, a mis-understanding occurred as to the costs, in consequence of which the writ of *saisie revendication* was executed and the action returned into Court. As to the first cause of difference between the parties, no proof has been adduced by the Respondent tending to contradict the evidence of Lecompte already alluded to, or to show that the Respondent had any justification, or any reasonable excuse for refusing to sign, before he left port, the bills of lading which he afterwards signed in the course of his voyage; and therefore as to the original matter in dispute, the Respondent must be regarded as the party in the wrong. Such being the facts of the case, the first question we have to determine is as to whether the Appellants had a right to seize *revendiquer* their flour under the circumstances above mentioned. This question is one of great importance, and not so free from difficulty as may at first sight appear. The right claimed by the Appellants might often be exercised so as to cause great injustice; indeed, there are but few cases in which a captain of a ship going to sea would not rather submit to be wronged to some extent than to wait in harbour sufficiently long to allow a part of the cargo to be taken out of his ship, perhaps from the bottom of the hold, under a process of *saisie revendication*; and late in the season the delay incident to the execution of such a process might endanger the ship and cargo, and the lives of all on board.

On the other hand, the shippers of goods would be placed in a false position, and left without anything like adequate protection, were the Courts to hold that masters of ships could carry off the goods intrusted to their care without delivering to the owners the customary bills of lading; such bills of lading being necessary, not only as receipts binding the master and the owners, but also as in effect giving the shippers the power of obtaining the immediate use of capital, if required, equal to the value of the property shipped.

The authorities on this question are not so conclusive as might be expected upon a point which must have very frequently presented itself; but still, in a case such as the present, it appears to me, upon general principles, impossible to deny the right contended for by the Appellants.

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The parties in this cause have expressly admitted—"That it is the usage and custom of trade in this Province, for masters of vessels to sign bills of lading for cargo shipped on request of shipper, before the vessel leaves port."

The usage thus admitted is as binding upon the parties as if there had been an express agreement between them to the same effect; for whether a contract be in writing or verbal, all incidents annexed by law or by custom, are tacitly understood. "*In contractibus tacite veniunt ea quæ sunt moris et consuetudinis.*"

Viewing then the contract of affreightment between the parties in this light it amounted to this: The shippers agreed to send 1500 barrels of flour on board of the "General Williams." The master of that ship, according to the admitted usage and custom of trade, was bound, before leaving port, to sign bills of lading on being requested so to do by the shippers.

And, thereupon, the master was to convey the flour to the port of destination, and to deliver the same as agreed, upon payment of freight.

Under this contract, the master, after he had been put *en demeure*, to sign bills of lading, had no right to carry to sea the flour belonging to shippers; and if he had no right to do this, then the shippers had a right to prevent their flour from being unlawfully carried off; and according to the laws of this Province a *revendication* is the usual remedy for the enforcing of a right such as that mentioned.

Our attention was drawn by the learned counsel for the Respondent, to a passage in Abbott on shipping, which is in these words: "If there is any dispute about the quantity or condition of the goods, or if the contents of the casks or bales are unknown, the words of the bill of lading should be varied accordingly." Abbott, English Edition, page 333; American Edition, page 419.

This authority appears to me to be perfectly reasonable; and cases frequently occur in our own trade in which I think the authority just cited ought to be acted upon; for instance, if upon the shipment of a large quantity of grain, a difference, involving a few bushels, were to occur as to the quantity shipped, I think it would be unreasonable on the part of the shipper to require the whole quantity shipped to be at once unloaded, in order to ascertain who was right; and if, in such case, the master were to offer a proper bill of lading for the quantity admitted, leaving it an open question as to the remainder—it may be well contended that a *saisie revendication* would not be justifiable.

The case of *Gordon et al., vs. Pollock*, 1 L. C. R., p. 318, cited at the argument, seems, at least in some respects, to be one of the class of cases to which I have adverted; and although, at first sight, that case may appear to be in favor of the Respondent, yet upon a careful consideration of the facts, I do not think that it will be found to militate against the view which I take of the present case.

In *Gordon et al. vs. Pollock*, the Plaintiffs alleged that they had shipped 467 barrels of flour on board of the bark *Jemima*, of which the defendant was master. The master contended that he had received 487 barrels only, and tendered bills of lading for that quantity. According to the report it appears that "part only of

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the flour in question had been shipped at Montreal on board of the *Jemima*, and that the remainder had been sent to Quebec by the barge *Scotland*, described as a ship tender, to be delivered there on board of the said bark *Jemima*, from the freight of which vessel, however, the freight earned by the ship's tender *Scotland*, was to be deducted. "The bills of lading relating to that portion of the flour were signed by Messrs. Gilmour & Co., the owners of the said barge, and contained the following undertaking: To be delivered on board of the *Jemima*, at the port of Quebec, or of any other vessel, to be pointed out by Thomas Gordon. It appears that the error, in relation to the 20 barrels missing, had taken place on board of the bark *Scotland*, and that these 20 barrels never reached the *Jemima*; so (according to the report) ran the bulk of the evidence.

As I view the case of *Gordon et al. vs. Pollock*, the Plaintiffs were altogether in the wrong,

The defendant had received but 437 barrels of flour; and the plaintiffs, in violation of the contract of affreightment, seized their flour because the defendant would not sign bills of lading for 20 barrels of flour more than he had received. The judgment of the Court, which is given at full length in the report, decides that under the circumstances above stated the plaintiffs had no right to seize their flour by process of *saisie revendication*; but the judgment does not appear to me to establish any thing beyond this.

The learned Counsel for the Respondent also drew our attention to an authority from Valin as indicating the course which the Appellants ought to have followed in the present case.

That passage, as cited in *Gordon et al. vs. Pollock*, is in the following words: "*Le refus du maître de signer le connaissement ne pouvant qu'être injuste, il y aurait action contre lui pour l'obliger de signer les connaissements, et pour faire ordonner que, faute par lui de signer, le jugement qui l'y condamnerait vaudrait signature.*"

The other writers on this subject seem to agree with Valin as to the course usually adopted in France by the shippers of goods when the masters refused to sign a bill of lading. But the authorities, at the same time that they shew that in France in cases such as the present, shippers obtained redress by suit, without seizure of the property shipped, further establish that the shipper had an undoubted right to prevent the vessel containing his goods from leaving the port until bills of lading were signed, or an equivalent therefor given to the shipper. *Émérigon, Traité des Assurances*, Vol. 1, page 312, says: *Si les chargeurs laissent partir le navire sans avoir fait signer le connaissement ils doivent l'imputer à leur négligence.*"

And Boulay Paty, *Cours de Droit Comm.*, Vol. 2, page 204, lays down the same doctrine in the same words.

The foregoing authorities which are in accordance with the general principles of our laws, establish that in the case before us the Appellants had a right to prevent the Respondent from taking their goods to sea until he had signed the usual bill of lading.

According to our law the usual mode of enforcing a right such as that last mentioned is by *saisie revendication*. In France it seems that the same object

was obtained by a proceeding less rigorous and less expensive; but in this country it is impossible to obtain redress in the way in which it was afforded in France, as our laws do not admit of summary proceedings in such matters. And such being the case, I am of opinion that the Appellants had a right to avail themselves of the ordinary process of law, namely, a *seizie revendication*, to prevent the unlawful carrying away of their property by the Respondent. Moreover, it may be observed, that although a judgment such as spoken of by Valin would be equivalent to a bill of lading as a receipt, certainly it would not be equivalent to a bill of lading viewed as a negotiable instrument representing the property shipped. Indeed, a judgment would be useless, comparatively speaking, for some of the most important purposes for which a bill of lading is generally required; and to compel a party to adopt a proceeding which could not possibly give a remedy commensurate with the wrong complained of, whilst full justice could be done under another form of proceeding, would be, in effect, a denial of justice.

The view which I take of the part of the case, now being considered, does not seem to be opposed to the judgment of the Superior Court, which is based on the sufficiency of the exception pleaded by the Defendant, and not upon the ground that the declaration of the Plaintiff did not disclose a good cause of action.

If, then, as I think the action of the Appellants was rightly instituted, they are entitled to their costs, unless the costs were waived by them, as the Respondent contends. Upon this point I am, I may at once say, against the Respondent. The *onus probandi* was upon him; and to say the least, there is not a preponderance of evidence in his favor. And here it is deserving of remark that the Respondent, when he pleaded to this action, does not seem to have been under the impression that the Appellants had given up their claim to costs: because, although at the enquete an attempt was made to prove that the Appellants agreed to waive their costs, no such waiver is alleged in the Defendants' exception.

It now remains only for me to say a few words as to the right of Appellants to return the action for their costs; and, as to this point, I cannot say that I entertain any serious doubt. The costs, it is true, do not form any part of the original cause of action; but they form a part of the Plaintiff's demand; and I cannot see any reason for saying that the Appellants had not as much right to a judgment upon that part of their demand as upon any other portion of it.

The Superior Court at Quebec, in the case *Durche vs. Dubuc*, 1 L.C.R., page 238, expressly maintained that a Plaintiff may return his action for the costs only. This judgment was in conformity to a judgment rendered by a majority of the Court of Queen's Bench, Sir J. Stuart, *dia.*, in the year 1847, in the case of *Dubord vs. Labranche*, Vol. 1 L.C.R., page 230. The same question recently came under the consideration of this Court in the case of *Herbert dit Lecompte*, and the *Fabrique of St. Jean*; and no one of the Judges, so far as I know, expressed even a doubt as to the right of a Plaintiff to return his action for costs.

Upon the whole, therefore, I am of opinion that, under the circumstances of

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this case, the Appellants had a right to sue out the writ of *saisie revendication* which issued therein; and I am further of opinion that the Respondent is liable for the costs accrued upon the suing out of the said writ,—that the Appellants did not waive their right to their costs, and that they had a right to return their action so as to have a judgment for costs. The costs of the seizure however ought not to be allowed. It was made after the bills of lading had been given and accepted and was therefore unnecessary.

As I mentioned at the argument, it would have been more regular if the Appellants in the return of this action had discontinued their demand except as to the costs. But their omission to do so has not been the cause of any additional expenses whatever; because in order to establish their claim to costs they had to prove their demand as stated in their declaration, as is plain from the factum of the Respondent.

The real controversy between the parties was as to whether the Appellants, under the circumstances of the present case, had a right to a *saisie revendication*, and as to whether they had a right to return their action for the costs only. And, holding as I do that they were right as to both these points, I think they are entitled to the costs necessarily incurred by them in order to establish their rights.

As I have already observed the right contended for by the Appellants, might, in many cases, be exercised so as to cause great injustice to the owners of ships; and it is obvious that all persons interested, either as owners or insurers, in the cargo of a vessel, might, by the delay incident to the seizure of a part of it, be subjected to great damage.

Indeed the interests of commerce, and therefore of the public generally, require that a vessel ready to go to sea, ought not unnecessarily to be detained in port: It therefore seems to me very questionable, whether the seizure of goods, shipped in usual course of trade, on board of a ship, and more particularly on board of a sea-going ship ought to be permitted, without the order of a judge; and also whether, in such a case, the judge ought not to be allowed, by the hearing of both parties, if the circumstances of the case admitted of it, or by the exacting of security, to guard against any unjust use of the rigorous process known in our law as a *saisie revendication*. If it be true that the shippers of goods, wrongfully carried away, ought to have an adequate remedy, it is equally true, that ship owners and others, ought, as far as possible, to be protected against the unjust use of such a remedy.

These points, however, are for the consideration of the Legislature, our duty as judges is to enforce the law as it exists.

Judgment was then recorded as follows:—

The Court * * * * seeing that the Appellants, on or about the thirtieth day of May, one thousand eight hundred and sixty-two, at the city of Montreal, under a contract of affreightment with the Respondent, shipped on board the ship called the "General Williams," of which the Respondent then was master, fifteen hundred barrels of flour, to be carried on board that vessel from Montreal to Liverpool:

Seeing also that it is admitted in this cause, that it is the usage and custom

of trade in this Province, for masters of vessels to sign bills of lading, for cargo shipped, on request of the shipper, before vessel leaves port :

Seeing that, after the shipment of the said fifteen hundred barrels of flour on board the said ship, and before the said vessel left the port of Montreal, as hereinafter mentioned, the said Respondent was repeatedly requested to sign bills of lading for the said fifteen hundred barrels of flour; and that the said Respondent without having any lawful or reasonable cause or excuse for so doing, refused to sign the said bills of lading, and also that afterwards, to wit, on or about the fifth day of June one thousand eight hundred and sixty-two, the said ship "General Williams" sailed from the said port of Montreal, under command of the said Respondent, with the said fifteen hundred barrels of flour on board, and without any bills of lading having been signed therefor; and considering that after the said Respondent had been so requested to sign the said bills of lading, and had refused to do so, he could not legally carry off to sea the said fifteen hundred barrels of flour so belonging to the Appellants; that, therefore, the said Appellants had a right to prevent him from so doing; and that according to the laws of this Province the Appellants were entitled to enforce their said right by the suing out of a writ of *saisie revendication*, as was done in this case; and considering that, although the Respondent, after the suing out of the said writ of *saisie revendication* delivered to the Appellants bills of lading, in due form, for the said fifteen hundred barrels of flour, thereby admitting the right of the Appellants to have the said bills of lading; and, although the Appellants accepted the said bills of lading, yet that the said delivery and acceptance of the said bills of lading, after the suing out of the said writ of *saisie revendication* did not deprive the said Appellants of their right to recover from the Respondent their costs incurred in suing out the said writ; and that the said Appellants, who are not proved to have waived their claim to said costs, had a right to return their said action into Court, in order to obtain a judgment for that part of their said demand by which they prayed for the costs; and considering therefore, that, in the judgment of the Court below, in so far as it dismisses the demand of the Appellant for their costs, and condemns them to pay costs to the Respondent there is error; doth in consequence, reverse the said judgment, to wit: the judgment rendered in this cause by the Superior Court, at Quebec, on the fifth day of December, one thousand eight hundred and sixty-two; and proceeding to render the judgment which the said court ought to have rendered, doth condemn the Respondent to pay to the Appellants their costs in the Court below, excepting the costs of the seizure of the said flour, which seizure was unnecessary, after the delivery and acceptance of the said bills of lading, as aforesaid; and the Court doth also condemn the Respondent to pay to the Appellants their costs in this Court; and lastly, it is ordered that the record be remitted to the Court below.

Judgment reversed.

Dissentiente the Honorable Mr. Justice Aylwin.

Holt & Irvine, for Appellants.

F. C. Vannovous for Respondent.

(F. C. V.)

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QUEBEC, 16 MARS 1863.

Coram AYLWIN, J., DUVAL, J., MEREDITH, J., MONDELET, J., BERTHELOT, J.

EN APPEL.

JOSEPH GUILLET DIT TOURANGEAU,

(*Opposant dans la Cour Inférieure.*)

APPELANT.

ET

JEAN BAPTISTE RENAUD,

(*Demandeur dans la Cour Inférieure.*)

INTIMÉ.

LEGS—INSAISSISSABILITÉ.

Jugé :—10. Que la condition imposée par un testateur, à sa libéralité, dans le but de rendre les immeubles, par lui légués, insaisissables par les créanciers du légataire, n'est ni imposible ni prohibée par la loi, ni contraire aux mœurs.

20. Que la condition d'un legs que le légataire ne pourra, en aucune manière, engager, affecter, hypothéquer, vendre, échanger ou autrement, aliéner les immeubles légués qu'après vingt ans, à compter du jour du décès du testateur, sous peine de nullité de tous actes que le légataire ferait contraires à la dite intention du testateur, n'est rien autre chose qu'une mesure sage et prudente; et que la prohibition d'aliéner doit être réputée équivaloir à une clause d'insaisissabilité temporaire.

L'intimé, ayant, le 15 Décembre 1856, devant la Cour Inférieure siégeant à Québec obtenu jugement contre l'Appelant, fit le 23 Novembre 1860, saisir deux immeubles appartenant à ce dernier. La vente en fut arrêtée par une opposition afin d'annuler, dans laquelle l'Appelant allégué :

"Que feu Joseph Guillet dit Tourangeau, en son vivant, rentier de la paroisse de St. Roch de Québec, par son testament exécuté en date à Québec, le 6 Juin 1855 devant M^{re} F. L. Gauvreau et confrère Notaires légua, dans le cas où sa fille Josephine Tourangeau se ferait religieuse, à Joseph Guillet dit Tourangeau son fils, opposant en cette cause, entre autres choses, les deux immeubles saisis en cette cause.

"Que la dite Josephine Tourangeau a fait profession religieuse et est entrée comme religieuse recluse dans le Couvent des Sœurs Ursulines de Québec, après le dit testament et elle y est encore.

"Le dit Opposant allégué de plus que le dit testateur a, par son dit testament, expressément ordonné que ses enfants au nombre desquels est l'opposant en cette cause, ne pourraient en aucune manière engager, affecter, hypothéquer, vendre, échanger ou autrement aliéner les biens immeubles étant dans leurs lots respectifs d'après les partages faits au dit testament qu'après vingt ans à compter du jour du décès du dit testateur sous peine de nullité de tous actes qu'ils feraient contraires à la dite intention du testateur.

"Qu'en conséquence de l'accomplissement de la condition opposée à la disposition en premier lieu mentionnée du testateur, savoir, la profession religieuse de Josephine Tourangeau, les emplacements saisis en cette cause sont tombés dans le lot de l'Opposant en la présente cause."

"Que le dit testateur est décédé à Québec le 30 Octobre 1855 ainsi qu'il appert par l'extrait mortuaire du dit testateur filé en cette cause."

"Que le dit testament a été bien et dûment enregistré au bureau d'enregistrement pour le comté de Québec le 30 Janvier 1856,"

" Qu'en conséquence de ce que ci-dessus dit, le Demandeur en cette cause n'a pas droit de faire saisir et vendre les dits immeubles légués au dit Opposant en contravention à la condition qu'ils ne pouvaient être hypothéqués, vendus, ou aliénés durant les vingt années qui suivent le décès du testateur, et la saisie des dits immeubles doit être mise de côté."

Guillet dit Tourangeau,
si
Renaud.

" A ces causes le dit Opposant, faisant élection de domicile en l'étude des soussignés en la haute ville de Québec, conclut humblement que la saisie des immeubles ci-dessus mentionnés faite sur le dit Défendeur et Opposant soit déclarée nulle et de nul effet et mise de côté avec dépens.

Cette opposition contestée par l'Intimé au moyen d'une défense au fonds en droit (Demurrer) et d'une exception péremptoire en droit perpétuelle, a été déboutée sur le premier plaidoyer, avant que les parties aient procédé sur l'exception.

L'on ne doit donc s'occuper dans le présent appel, que des contestations légales soulevées par cette défense au fonds en droit à l'appui de laquelle l'Intimé a allégué spécialement les raisons suivantes.

" Raisons du Demandeur au soutien de sa défense au fonds en droit."

" 1o. Parceque cette disposition du testament de Joseph Guillet dit Tourangeau père, citée dans l'opposition afin d'annuler en cette cause et par laquelle il est spécialement ordonné que ses enfants, au nombre desquels est l'opposant en cette cause, ne pouvaient en aucune manière engager, affecter, hypothéquer, vendre, échanger ou autrement aliéner les biens immeubles étant dans leurs lots respectifs, d'après les partages faits au dit testament qu'après vingt ans à compter du jour du décès du dit testateur sous peine de nullité de tous actes qu'ils feraient contraires à la dite intention du testateur" est en loi nulle et de nul effet quelconque.

" 2o. Parceque cette disposition du testament telle qu'elle est exprimée n'est pas exécutoire contre les tiers qui n'étaient pas parties au dit testament et qu'elle énonce plutôt un conseil et un désir de la part du testateur qu'une prohibition réelle et efficace.

" 3o. Parceque cette disposition du dit testament ne peut avoir l'effet d'empêcher la saisie et la vente judiciaire des immeubles compris dans la dite prohibition.

" 4o. Parceque cette disposition pour être efficace aurait dû contenir en même temps une substitution et disposer autrement des dits immeubles dans le cas où quelqu'un des enfants du dit testateur ne se conformerait pas à cette injonction.

" 5o. Parce qu'il est allégué dans l'opposition afin d'annuler du Défendeur produite en cette cause, que le dit Défendeur était propriétaire en possession des immeubles saisis en cette cause.

" 6o. Parceque les conclusions d'icelle opposition ne découlent pas des prémisses."

La Cour Inférieure, après avoir entendu les parties sur le mérite de la défense au fonds en droit, a, le 5 Mai dernier, rendu le jugement suivant :

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" PRÉSENT."

L'Honorable Jean Thomas Taschereau, Juge Suppléant.

" La Cour ayant examiné la procédure de record, et entendu les parties par leur avocats en droit sur les plaidoyers, savoir, sur le mérite de la défense en droit filée par le Demandeur à l'encontre de l'opposition afin d'annuler du Défendeur, Joseph Guillet dit Tourangeau; considérant que la clause énoncée au testament du dit feu Joseph G. Tourangeau, en date du 6 Juin 1855, passé à Québec, par devant Mtre Gauvreau et son confrère, Notaires Publics, et en vertu de laquelle, l'opposant prétend que les immeubles à lui legués par son dit père, et saisis en cette cause, ne pouvaient être légalement, quant à présent, saisis en cette cause, à raison de la défense d'aliéner contenue en telle clause du dit testament, contient une défense d'aliéner qui ne peut en loi produire d'effet sérieux, et doit plutôt être considérée comme renfermant un conseil plutôt qu'une défense sérieuse d'aliéner. Considérant de plus que la dite clause ne contient aucune disposition à l'égard des dits immeubles dans le cas où la défense d'aliéner serait violée par le Défendeur, et qu'il n'y a ni substitution d'établie, ni indication de personnes à qui iraient les dits biens dans le cas où le Défendeur en aliénant aurait perdu la propriété ou la jouissance des dits immeubles : Considérant que la clause susdite ne peut être considérée comme léguant la propriété ou la possession des dits immeubles au Défendeur, à titre d'aliments ou comme insaisissables à moins d'une stipulation expresse à cet égard; maintient la dite défense en droit du Demandeur à l'opposition afin d'annuler du Défendeur et renvoie la dite opposition avec dépens."

M. Casault, pour l'Appelant a argumenté comme suit :

Cette Cour n'a donc à se prononcer dans le présent appel que sur l'effet que doit avoir la défense d'aliéner les propriétés dont il s'agit, alléguées dans l'opposition de l'Appellant.

Doit-elle être observée sous la peine de nullité, qui y trouve imposée par le testateur ? Ou ne doit-elle être considérée que comme ne renfermant qu'un simple conseil, un désir non obligatoire ?

Troplong, dans son traité des Donations entre-vifs et des testaments, No. 271, se prononce clairement en faveur de l'exécution de cette défense d'aliéner :

" No. 271, Que dirons-nous de la clause portant défense d'aliéner par vente, échange ou engagement pendant un certain temps ? Les opinions sont partagées. Mais je ne vois rien qui vicie cette condition, qui souvent est imposée par le testateur pour de bonnes raisons de prévoyance, de convenance, d'économie domestique. Le donateur, en donnant un immeuble à une personne de sa famille, peut cependant éprouver du regret de le voir, de son vivant, sortir des mains de celui qu'il considère comme un autre lui-même; il lui impose alors l'obligation de ne pas aliéner de son vivant. Dans d'autres circonstances, le testateur peut craindre que le légataire ne soit trop pressé de jouir et qu'il n'abuse du droit de propriété dont il le gratifie; pour l'accoutumer à être propriétaire, pour l'affection-

ner à sa propriété, il lui impose la condition de la garder pendant 5 ans. Ne sont-ce pas là des mesures sages et prudentes ? Pourquoi les repousser avec une sévérité sans règle ? La prohibition d'aliéner n'est censée contraire à la liberté qu'autant qu'elle est absolue ; c'est alors seulement qu'elle est considérée comme non écrite."

Cette opinion de Troplong est tellement bien motivée qu'on ne peut s'empêcher de l'admettre sur cette question. L'Appelant s'attend donc que le jugement de la Cour Inférieure, qui s'y trouve directement opposé sera infirmé par cette Cour.

Beleau, pour l'Intimé, a argumenté comme suit :

Nous maintenons que ce jugement est bien fondé en loi et conforme à la doctrine de tous les anciens auteurs sur la matière. Ricard, dans son traité des Donations, le nouveau Denisart à l'article défense d'aliéner, Pothier, dans son traité des Substitutions, sont tous unanimes à dire qu'une *Défense d'aliéner* pure et simple ne produit aucun effet sérieux et doit être interprétée comme un simple conseil et que l'aliénation faite par le donataire malgré cette défense, est valable sans pouvoir être arguée de nullité ni par le donateur ni par le donataire ni par leurs ayant cause. Or, nous prétendons que la défense d'aliéner contenue dans le testament de M. Tourangeau père est une défense pure et simple. En effet, elle ne contient pas de fidéicommiss ni de substitution ; elle n'indique ni formellement ni tacitement à qui écherront les immeubles légués au cas où quelqu'un des enfants contreviendrait à ce précepte. Cette indication est de rigueur. C'est ce que dit positivement Ricard au No. 331. "Aussi est-il nécessaire, dit-il, pour faire un fidéicommiss que non seulement celui qui est chargé de restituer n'ait pas la liberté d'aliéner, mais aussi qu'il y ait quelqu'un auquel le fidéicommiss soit destiné, parceque, cessant cette dernière condition, le fidéicommiss ne pouvant pas avoir d'effet, vu qu'il n'y a personne pour le recueillir, il doit dans les règles, demeurer au premier légataire qui en était chargé, et ainsi devenant propriétaire incommutable de la chose, il est de la nature essentielle de sa possession qu'il en soit le maître absolu pour en disposer à sa volonté, sans que le testateur ait pu valablement lui en interdire l'aliénation, ce qui est cause que la prohibition qu'il en a faite passe pour un commandement inutile, *nulum preceptum*, lequel étant contraire au droit qu'il a donné au légataire ne peut être d'aucun effet."

MEREDITH, J., *Dissentiens* :—The principal question to be decided in this cause is as to the effect to be given to a testamentary disposition in the following words :

"Il est spécialement ordonné que ses enfants, au nombre desquels est l'opposant en cette cause, ne pourraient en aucune manière, engager, affecter, hypothéquer, vendre, échanger ou autrement aliéner les biens immeubles étant dans leurs lots respectifs, d'après les partages faits au dit testament, qu'après 20 ans à compter du jour du décès du dit testateur, sous peine de nullité de tous actes qu'ils feraient contraires à la dite intention du testateur."

Property held by the Appellant under the foregoing provision has been seized ; an opposition founded on it was filed by the Appellant in the Court below ; and

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it is from a judgment of the Superior Court, dismissing the opposition so filed, that the present case comes before us.

On the part of the Respondent it is contended that a *simple défense d'aliéner* does not create a substitution and is not in any respect binding in law; and, therefore, that notwithstanding such a prohibition, the donee or legatee may make a valid alienation of the property to which it refers. In support of this view the Respondent has referred to Ricard, who says:—"Les lois ont résolu par une décision générale que lorsque la prohibition est pure et simple, et sans cause, qu'elle ne produit aucun effet et que non-seulement les héritiers ab intestat du testateur, ni celui à qui les défenses ont été faites n'ont droit de prétendre aucun *fidéicommiss* en leur faveur, mais aussi que l'institué ou le légataire ne laisse pas nonobstant la prohibition d'avoir la liberté d'aliéner."*

The opinion of Henrys on this subject is to the same effect, his words are as follows: "Donc, s'il y a quelques distinctions à faire, c'est entre la prohibition d'aliéner pure et simple et la prohibition d'aliéner faite en faveur de quelqu'un. La première n'opère rien, et le testateur n'ayant pas passé plus avant, elle ne passe que pour un simple conseil; mais au contraire si le testateur en prohibant à ses héritiers et successeurs d'aliéner les biens qu'il leur a délaissés, déclare que c'est afin qu'ils soient conservés à ceux qu'il désigne: par exemple à ses descendants, ou à ceux de sa famille, en ce cas la prohibition d'aliéner emporte un fideicommiss, et c'est la même chose que si les descendants ou ceux de la famille avaient été substitués à l'héritier; il faut donc que la prohibition soit faite en faveur de quelqu'un pour empêcher que l'héritier ne puisse pas vendre. C'est la disposition du droit en la loi 38 § 4. et de la loi 93 § ff. de legat. 3, mais plus expresse en la loi *filius familias*. 114. § *divi*. 14. ff. de legat. 1, où, le jurisconsulte dit que les empereurs avaient décidé qu'il ne suffisait pas de prohiber l'aliénation, mais qu'il fallait encore exprimer la cause, et déclarer la personne en faveur de laquelle on recherchait cette précaution, qu'autrement, nisi invenitur persona cuius respectu hoc a testatore dispositum sit, nullius esse momenti scripturam, quasi nudum praeceptum reliquerit."†

Pothier also says: "La simple défense d'aliéner, lorsque le testateur n'a pas témoigné en faveur de qui il faisait cette défense, ne passe, à la vérité, que pour un simple avis, *nudum praeceptum*, auquel celui à qui la défense est faite peut impunément ne pas déléguer."‡

* Ricard, des Donations, p. 315, Traité des Substitutions, titre III, ch., p. 1, No. 329.

† 3 Henrys, page 219, Li. 5, ch. 4, Quest. 49, No. 2.

‡ 5 Pothier, des Substitutions, page 518: See also, 6 Toullier, p. 521, No. 498:—6 Nouveau Denisart, p. 74:—See also the case of Fafard & Bélanger, 4 L. C. R. page 215, and more particularly the remarks of M. Justice Caron in the case: "Je considère cette défense d'aliéner obligatoire parce qu'elle comporte la condition de transmettre ses biens aux héritiers du côté et ligne, il en serait autrement si la défense était pure et simple. 2 Bourjon, p. 134, Tit 5, ch. 5, Sec. 7, Nos. 53, 54:—1 Despeisses, page 19 part 1, 1 and 1, Sec. 2, (10) Tertio:—Dictionnaire des Arrêts, (Brillon) page 126, Verbo Aliénation, Nos. 25 et 37:—2 Despeisses, page 138, part 1, titre 2, des Substitutions, sect. 6, art. 2. No. 32:—Rousseau de Lacombe, (Ed. 1769,) page 674, Verbo Substitution Sec. 1, Dist., 2 No. 5:—Merlin, Rep., (Ed. 1828, 80) page 152, 153, Vbo. Substitution Fid. Sec. 8, No. 5:—Poujol, Traité des Don. Ed. 1836, page 90.

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According to the foregoing authorities a *défense d'aliéner* is to be considered *pure et simple*, unless it be stipulated in the interest, either of the party making the donation or legacy, or of some third person; and a *défense d'aliéner pure et simple*, as above defined, is to be deemed merely as advice on the part of the person making the prohibition, and not binding upon the person to whom it is addressed. The reason upon which, as I believe, the above rules are founded being that in case of a *défense d'aliéner pure et simple* there is no person interested, in the enforcing of it, except the donee, or legatee, and that a provision which cannot be enforced, except at the will, and by the party intended to be bound by it, cannot in law be held legal and binding.

The appellants on their part have drawn our attention to the opinion of Troplong and Demolombe, as showing that a *défense d'aliéner* when made the condition of a legacy, may in certain cases, be unobjectionable, and in such cases ought to be enforced by the Courts.

Troplong in the passage cited in the factum of the appellants says: "Que dirons-nous de la cause portant *défense d'aliéner* par vente, échange ou engagement pendant un certain temps? Les opinions sont partagées, mais je ne vois rien qui vicié cette condition, qui souvent est imposée par le testateur pour de bonnes raisons de prévoyance, de convenance, d'économie domestique. Le donateur, en donnant un immeuble à une personne de sa famille, peut cependant éprouver le regret de le voir de son vivant, sortir des mains de celui qu'il considère comme un autre lui-même, il lui impose alors l'obligation de ne pas aliéner de son vivant. Dans d'autres circonstances, le testateur peut craindre que le légataire ne soit trop pressé de jouir, et qu'il n'abuse du droit de propriété dont il le gratifie; pour l'accoutumer à être propriétaire, pour l'affectionner à sa propriété, il lui impose la condition de la garder pendant cinq ans. Ne sont ce pas là des mesures sages et prudentes? Pourquoi les repousser avec une sévérité sans règle? La prohibition d'aliéner n'est censée contraire à la liberté qu'autant qu'elle est absolue; c'est alors qu'elle est considérée comme non écrite."*

And Demolombe, expresses his opinion, as to this point in nearly the same words.

In considering the foregoing observations of Troplong and the opinion of Demolombe to the same effect, it is necessary to bear in mind that a very wide difference exists between the law of France and our law as to the subject under consideration. The art. 896, of the Code Civil declares "Les substitutions sont prohibées, toute disposition par laquelle le donataire, l'héritier institué ou le légataire sera chargé de conserver et de rendre à un tiers sera nulle même à l'égard du donataire, de l'héritier institué ou du légataire."†

These provisions being altogether at variance with our own law on the subject, it is plain that the observations of Troplong and Demolombe must be read by us with great caution; and bearing this in mind it appears to me that all that Troplong and Demolombe are to be understood as saying, in the passages relied on by the appellants, is simply, that a prohibition to alienate in a donation or will, if made for a short time, and from reasonable motives, is not absolutely null, even under the provisions of the Code Civil.

* 1 Troplong, Donations et Testaments, No. 271 :—1 Grenier, Donations, page 186.

† 18 Demolombe, page 328, No. 803.

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Those learned writers show that such a provision can be enforced if made in the interest of the donee or legatee, or of a third party; and that if accompanied by a penal clause, the penalty may be enforced in the event of a violation of the prohibition to alienate. But I am not aware that there is anything in the writings either of Troplong or of Demolombe tending to establish that a prohibition to alienate, when made exclusively in the interest of the donee or legatee, can be enforced by the donee or legatee against his own acts, and to the prejudice of his own creditors.

In the present case the appellant relies on a *défense d'aliéner* in which, in so far as regards the property in question, no person but himself is interested, and the object of his opposition is to prevent the sale of the property in question for the satisfaction of a judgment rendered against himself to enforce the payment of a debt, which, it may be observed, to the extent of about £1100, appears to have been contracted after the death of the testator, whose will contains the *prohibition d'aliéner* relied on by the Appellants. There is not, I repeat, so far as I know, anything in the works of Troplong or of Demolombe to justify the pretensions of the Opposant. On the contrary, Demolombe No. 306 says:—"Il nous paraît impossible d'admettre le donataire ou le légataire qui aurait consenti l'aliénation, à se prévaloir ensuite contre les tiers, auxquels il aurait concédé des droits, de la défense d'aliéner qui lui aurait été imposée, et qu'il aurait lui-même enfreinte; car il ne se peut pas qu'il évince ceux-là même auxquels il doit garantie."

Troplong also in his *Traité du contrat de mariage*, No. 3060, et seq., maintains the same doctrine. The foregoing observations I think suffice to prove that the opinions of Troplong and Demolombe are not in reality opposed to the authorities from our own law, upon which the judgment of the Superior Court is based; but in order to remove any doubt as to the point I shall cite one further passage from the works of each of those authors.

"Troplong puts the question:

"La prohibition d'aliéner forme-t-elle une substitution?" And he thus continues. "Il faut répondre négativement à cette question; car cette prohibition ajoutée à une institution est nulle en loi, et ne forme qu'un précepte nu, *nudum preceptum*, qui ne lie point, qui ne donne d'action à personne, et dont on peut dire avec Papinien qu'il a été donné *obtentu consilio*."

And Demolombe says: †

"On paraît avoir de tout temps reconnu que la défense ou prohibition d'aliéner ne constitue qu'un simple précepte non obligatoire, *nudum preceptum*, lorsqu'elle est pure et simple; c'est-à-dire lorsqu'elle n'est pas faite en faveur d'une personne qui est appelée à en profiter *nisi inveniatur persona cuius respectu hæc a testatore dispositum est*, "L. 114, § 14, ff. de Leg. Thevenot Nos. 129, 130. C. in—Dolise, art. 806, No. 32."

It has, however, been said, and will, I believe, be maintained, that the authorities relied on by the Respondent have no bearing upon the present case because they relate to prohibitions to alienate in connection with the doctrine

* Troplong, *Donations et Testaments*, No. 135, p. 198.

† "18 Demolombe, No. 147, p. 172.

of substitution, and not (it is said) to prohibitions to alienate unconnected with substitution, such as the case before us presents.

The answer, I believe, to this objection is, that the two subjects are so closely connected as to make it impossible to treat of them separately. A *défense d'aliéner*, if made in favor of a third person, is (as has already been observed) in effect, a substitution; and is, therefore, in law obligatory. Whereas if the *défense d'aliéner* is not made in favor of a third person, it is not a substitution. In one very important point of view, therefore, in order to ascertain whether a *défense d'aliéner* is, or is not, valid, it is necessary to inquire whether it does or does not amount to a substitution.

This probably is one of the reasons which have caused the two subjects to be considered together by the most eminent French Jurists; who, I may observe, were not likely to treat, as closely connected, questions really independent of each other.

There is another view which may be taken of this case, and which was strongly pressed upon our consideration by the learned counsel for the Respondent.

The testator, in the will under consideration, without assigning any cause or reason for the *défense d'aliéner*, which it contains, has extended it to all his legatees, and over the whole of his property for a period of twenty years; and it has been contended by the learned counsel for the Respondent, and, I think, with reason, that if such a clause is good for a period of twenty years, there are no grounds for saying that it would not be equally good for forty years, or for the lifetime of the legatees.

Now the policy of our law is, and ought to be, that property over which a man has full control should be subject to the payment of his just debts; whereas the effect of the provision in question, if it be valid, is to enable legatees to hold property over which they have, in reality, unlimited control, free from the payment of their debts, and this irrespective of the nature of the debt sought to be enforced, or of the extent of the property held subject to such condition.

It has, therefore, been further contended by the Respondent, that the provision of the will upon which the Appellant rests his claim ought to be held null on the ground of public policy.

It may, however, be answered, that a testator may, by an express provision to that effect, bequeath property so as to be free from seizure for the debts of the legatee; * and that property left expressly *pour aliments* (as the authors say) is not liable to be brought to sale for the debts of the legatee.†

But admitting, for sake of argument, and subject probably to certain limitations, that the law sanctions the two descriptions of bequest just mentioned, when expressly made; still it is not the less true that bequests tending to prevent the alienation of property, and to enable the party holding it either to pay his debts or not, just as it may please him, are not entitled to favorable consideration; and I think that in giving effect to such clauses, we ought not to go beyond the

* 7 Pothier, Proc. Civ., p. 197.—1 Pigeau, p. 613.

† 3 Ancien Denisart Vbo. Saisie Arrêt, 23, No. 6, Seconde partie, p. 9.

See also Judgment of Superior Court at Montreal, Boyer vs. Dillon and Watson, Opp. about 1853-1854.

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limits established by the authorities, or to add by reasoning from analogy to the number of exceptional cases which, on special grounds, are already sanctioned by law; and this, I think, we practically would do, were we to give effect to the testamentary provisions relied on by the appellant.

But although I think the point just adverted to ought not to be passed wholly unnoticed, I wish it to be understood that the ground upon which I would deem it my duty to confirm the judgment of the Court below is, that in my opinion, it is a well established rule of law, that a *défense d'aliéner pure et simple*, such as that contained in the will before us, is inoperative.

This rule which, having its foundation in the Roman law, appears to have been acted upon for centuries in France,* has been transmitted to us as law by Jurists such as Ricard, Henrys and Pothier, and is not controverted, so far as I know, by any writer upon the ancient or modern law of France.

I therefore think that the learned judge of the Superior Court was justified in taking that rule as his guide, and that his judgment, which purports to be founded upon it, and is in all respects in accordance with it, ought to be confirmed.

BERTHELOT, J.—Par son testament du 6 Juin, 1855, Gauvreau, notaire, feu Joseph Guillet dit Tourangeau a disposé de ses biens en faveur de ses enfants " avec défense d'engager, affecter, hypothéquer, vendre, échanger ou autrement aliéner les dits biens immeubles qu'après vingt ans à compter du jour du décès du testateur sous peine de nullité de tous actes qu'ils feront contraires à la dite instruction du testateur."

La question soulevée est de savoir si cette défense doit avoir son effet ou si elle ne doit pas tomber à néant attendu que le testateur n'a pas établi de substitution et n'a pas indiqué à qui iraient les biens dans le cas où les légataires en aliénant auraient perdu la propriété ou la possession des dits immeubles.

Il faut bien remarquer qu'il ne s'agit que d'une défense d'aliéner limitée à vingt ans et non pas d'une défense d'aliéner pour toujours et si l'on voulait bien comprendre combien il y a de différence entre l'un et l'autre cas, on ne trouverait pas toute la difficulté que l'on croit voir dans cette espèce.

Sous l'ancien droit français, une défense d'aliéner pour toujours sans substitution ou sans indication de personne pour recueillir dans le cas où la condition serait violée par le légataire ou le donataire était regardée comme nulle et sans effet. C'est ce qui paraît être enseigné par Ricard et Pothier, aux endroits cités dans le factum de l'Inimé dans le cas d'une défense d'aliéner illimitée, mais ni l'un ni l'autre n'ont traité de la défense d'aliéner pour un temps, en sorte que l'on ne doit pas recevoir comme règle absolue, ce que l'un et l'autre nous enseignent sur ce sujet.

Dans cette cause il ne s'agit que de défense durant un certain temps (cas tout différent) et qui est regardé avec raison par Troplong, Donations, No. 271, et par Demolombe, vol. 18, no. 294, comme étant une clause qui doit avoir son effet. Troplong s'exprime ainsi " La prohibition d'aliéner n'est ainsi contraire à la liberté qu'autant qu'elle est absolue: c'est alors seulement qu'elle est considérée comme non écrite."

*Vide Arrêt du Parlement de Paris, 14 Sept. 1804.

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Demolombe, no. 294, "Mais si nous considérons comme illicite la condition de ne pas aliéner lorsqu'elle est absolue et indéfinie, notre avis est *au contraire*, qu'il faut la considérer comme licite lorsqu'elle est seulement relative et temporaire et qu'elle se trouve d'ailleurs justifiée par un intérêt sérieux.

"C'est ce qui peut arriver dans trois cas, à savoir lorsqu'elle a pour but de garantir :

"a. Soit l'intérêt du disposant,

"b. Soit l'intérêt d'un tiers,

"c. Soit même aussi l'intérêt du donataire ou du légataire.

Après avoir expliqué ce qu'il entend par l'intérêt du disposant et l'intérêt d'un tiers, il en vient au no. 305, à dire "Enfin nous avons dit qu'il se pouvait même que la condition de ne pas aliéner doit être considérée comme licite dans le cas où elle aurait été imposée dans l'intérêt du donataire ou du légataire.

"Cette dernière application de notre règle est toutefois la plus délicate. Le disposant, par exemple, a mis pour condition que le donataire ou le légataire qui est encore un jeune homme de 20 ans ne pourrait pas aliéner avant d'avoir atteint l'âge de 25 ans ou avant de s'être établi par mariage. Est-ce licite? non, pourrait-on répondre car une telle condition n'est qu'une prolongation de minorité et d'incapacité relativement à la chose donnée ou léguée, et puis si on peut défendre l'aliénation au gratifié pendant cinq ans, pourquoi pas pendant dix ans, vingt ans, pendant toute sa vie.

"Nous avons d'abord été portés à la croire ainsi. Mais pourtant est-ce que l'on ne considère pas généralement comme licite la condition qui serait imposée au donataire ou au légataire de ne pas se marier avant un certain temps. Or la capacité de se marier est certes tout autant de droit public que la capacité d'aliéner et puisque la condition de ne pas se marier avant un certain temps est licite, pourquoi la condition de ne pas aliéner avant un certain temps serait-elle illicite?

Il me semble que l'on ne peut douter quel est le sentiment de l'auteur et je ne vois pas qu'il se soit contredit en disant au no. 206 "qu'un légataire qui aurait consenti à l'aliénation ne serait pas reçu ensuite à se prévaloir contre les tiers auxquels il aurait concédé des droits, de la défense d'aliéner, qui lui aurait été imposée et qu'il aurait lui-même enfreinte; car il ne se peut pas qu'il évince ceux-là mêmes auxquels il doit garantir."

Pandectæ, vol. 12, p. 245, quand la défense d'aliéner fait présumer l'existence d'un fidéicommissaire "Mais si les testateurs n'adoptent ce mode de disposition que dans l'intérêt de leurs enfants descendants, etc., etc., elle doit être observée; cette défense toutefois ne peut préjudicier ni aux créanciers ni au fisc."

Si donc pour se conformer à cette disposition l'héritier a vendu ses propres biens pour acquitter les dettes du testateur les fidéicommissaires courent les mêmes chances. *L'on voit qu'il ne s'agit que des créanciers du testateur et non de ceux du légataire.*

Dans le cas actuel le légataire n'a pas vendu; il a contracté une dette, il devra la payer sur la garantie qu'il en a donnée et pouvait donner sur ses biens libres, ou ceux qu'il tient de son père, sur et à même les revenus qu'ils pourront donner

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pendant vingt ans. C'est là l'étendue de la garantie qu'il a donné et pouvait donner, il ne pouvait donner plus de sûreté que celle des biens tels qu'ils lui étaient donnés et comme il était donné. Il n'y a eu aucune surprise ni mauvaise foi de sa part. Le créancier avec qui il a traité connaissait le testament du père ou avait les moyens de le connaître, comment pourrait-il donc se plaindre, et d'ailleurs, si le testateur n'eut rien donné à son fils ou n'eut légué qu'avec une clause d'insaisissabilité, qu'est-ce que le créancier aurait-eu à dire ? Rien du tout.

Enfin Demolombe rapporte au no. 308, un arrêt de la cour de cassation cassant un jugement de la cour de Lyon, qui avait déclaré illicite et contraire aux lois, une clause par laquelle le donateur déclare que le donataire ne pourrait pas aliéner même avec son consentement, laquelle clause avait été enfreinte par l'un et l'autre, cependant l'hypothèque consentie par le donateur et le donataire fut annulée.

Sous notre législation actuelle avec la liberté illimitée de tester ainsi qu'elle existe par le statut de 1801, je pense qu'il y a beaucoup plus de raison de suivre ce qui est enseigné par Troplong et Demolombe. Ricard, Pothier et autres auteurs ont écrit et raisonné sous l'empire d'un système différent du droit de tester et nous ne pouvons recevoir leur doctrine sans restriction.

Ne pourrait-on pas dire aussi que d'après la règle que le donateur ou testateur est libre d'apposer à sa libéralité telle condition qu'il lui plaît, le legs dans les termes qu'il est fait doit avoir tout son effet suivant les intentions du testateur bien clairement exprimées.

C'est là ce que nous devons tâcher d'effectuer. L'on voit assez ce que le testateur a voulu. Si cette clause devait être sans effet je croirais qu'il serait bien difficile pour un testateur de s'exprimer de manière à s'assurer de l'exécution de ses volontés, pourvu toujours qu'elles ne fussent pas contraires à une loi positive ou aux bonnes mœurs, ce qui n'est nullement le cas dans ce testament, car ce sont là les deux seules exceptions qui peuvent empêcher de donner suite aux volontés d'un testateur.

Dans le cas de doute entre les deux systèmes soutenus par les parties et les auteurs, je suis naturellement disposé et je crois que je dois pencher pour la *conservation des biens*, et les enlever à l'atteinte des créanciers durant le temps que le testateur a voulu pour l'avantage de son légataire, et comme dit Troplong, *loco citato*, pour l'accoutumer à être propriétaire.

En outre, je pense qu'il n'était pas opportun de décider la question aussi abstraitement qu'elle l'a été sur une défense en droit. J'aurais ordonné aux parties d'aller à la preuve afin que l'on pût voir et lire le testament. Je n'aime pas à décider une question aussi importante sans lire le testament et toute la procédure et voir même la cause de la dette.

Il y aura peut-être alors quelques raisons d'équité qui nous porteront à ne pas remettre de côté la volonté du testateur si sage et si bien exprimée.

MONDELET, J.—La question a été, en Cour de première instance, jugée sur la défense au fonds en droit à l'opposition.

Voici ce dont il s'agit :

Un père, par prudence, sans doute, impose à la disposition de ses biens à ses enfants, la condition suivante :

" Il est spécialement ordonné que ses enfants ne pourront en aucune manière engager, affecter, hypothéquer ou aucunement aliéner les biens immeubles étant dans leurs lots respectifs d'après les partages faits au dit testament qu'après vingt ans à compter du jour du décès du dit testateur, sous peine de nullité de tous actes qu'ils feraient contraires à la dite intention du testateur."

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Le défendeur, enfant du testateur qui est décédé, a été poursuivi, et l'immeuble saisi sur lui. Sur ce, opposition de la part du défendeur fondée sur la clause du testament sus-relatée.

Le demandeur a attaqué cette opposition par une *défense en droit*, et une *exception péremptoire en droit*. Il ne s'agit que de la *défense en droit*.

La clause me paraît bien sage, et assurément qu'un père en limitant à vingt ans, le droit chez des enfants, d'aliéner ou hypothéquer les biens qu'il leur laisse, à la condition qu'il juge à propos de mettre à sa libéralité, ne doit pas être reconstruit par la singulière raison qu'il ne devait pas être sérieux, que ce n'était qu'un avis, qu'un conseil.

Quelques-uns des anciens auteurs se contentent de repousser cette condition ainsi imposée, mais quelles raisons donnent-ils? Aucune, à mon avis—si ce n'est qu'il n'y pas de substitution, ni de fidei-commis d'établi! Qu'à à faire cela à la question? Il ne s'agit aucunement de substitution, ni de fidei-commis—et il me semble que le jugement n'aurait dû rien dire de cela.

Or n'y a aucun texte de loi, qui affecte la clause dont il est question. Il faut donc, par conséquent, chercher dans la raison, la justice et une saine philosophie, la solution de cette question qui, à mon avis, ne fait pas la moindre difficulté.

Il n'y a rien de plus raisonnable que cette condition, c'est un acte qu'un père sage et prudent est censé avoir eu d'excellentes causes d'imposer. Le testateur pouvait ne pas laisser ce bien à cet enfant, alors les créanciers n'auraient eu rien à dire. Il l'a donné à telle condition, ils n'ont encore rien à dire.

Il n'y a rien de plus juste envers les enfants qu'il convient d'habituer à jouir en propriétaires sages et prudents, qu'il importe d'empêcher de faire passer leurs biens de familles en mains étrangères. Au reste, cette prohibition est limitée à vingt ans.

Il y a dans cette disposition, un acte d'une saine philosophie, de la part du père, qui ne viole aucun principe, qui ne fait rien contre l'ordre public, ni contre les bonnes mœurs, c'est conforme à notre droit du Canada, (Stat. de 1774 et Stat. de 1801,) mais qui, par la sagesse, contribue à faire fuir ce qu'il importe à la société de voir n'effectuer, l'économie et la prudence de ses membres, et la conservation raisonnable, pour quelque temps du moins, de la propriété, dont la stabilité est d'une grande importance.

Je pense sans dire, que l'autorité de Troplong, en dit plus, en peu de lignes que tout ce que certains auteurs se sont complu à répéter les uns après les autres, il est à peine nécessaire que j'ajoute que je préfère me ranger avec lui, du côté de la raison, de la justice et de la philosophie, en l'absence d'un texte formel de la loi, que d'accepter sans les soumettre à l'analyse raisonnée, les assertions crues de quelques auteurs qui se bornent à les faire, ou qui, pour appuyer leur sentiment, mettent la substitution et le fidei-commis en scène, là où il n'en est

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aucument question. Je me contente donc de lire les quelques lignes de Troplong qu'appuie Demolombe, et de résumer toute ma pensée dans leur opinion si exactement exprimée et bien mieux rendue que je ne le pourrais faire.

"No. 271. Que dirons-nous de la clause portant défense d'aliéner par vente échange ou engagement pendant un certain temps? Les opinions sont partagées. Mais je ne vois rien qui vicie cette condition, qui souvent est imposée par le testateur pour de bonnes raisons de prévoyance, de convenance, d'économie domestique. Le donateur, en donnant un immeuble à une personne de sa famille, peut cependant éprouver du regret de la voir, de son vivant, sortir des mains de celui qu'il considère comme un autre lui-même; il lui impose alors l'obligation de ne pas aliéner de son vivant. Dans d'autres circonstances, le testateur peut craindre que le légataire ne soit trop pressé de jouir et qu'il n'abuse du droit de propriété dont il le gratifie; pour l'accoutumer à être propriétaire, pour l'affectionner à sa propriété, il lui impose la condition de la garder pendant cinq ans. Ne sont-ce pas là des mesures sages et prudentes? Pourquoi les repousser avec une sévérité sans règle? La prohibition d'aliéner n'est censée contraire à la liberté qu'autant qu'elle est absolue. C'est alors seulement qu'elle est considérée comme non écrite."*

J'ajouterai pourtant que ce n'est pas parce que Troplong et Demolombe peuvent ainsi, que je me décide, mais parce que leur sentiment étant d'accord avec ce que je pense être vrai, je les cite comme appuis, et non comme autorité à laquelle je me ferais soumettre. En pareille matière, je ne me soumetts qu'à un texte de la loi, ou d'ordonnance. Je pense donc que le jugement de la Cour de première instance devrait être infirmé, et la défense en droit renvoyée.

Le juge Aylwin a prononcé le jugement comme suit :

La Cour * * * "Considérant que le testament de feu Joseph G. Toungeau, en date, à Québec, du six juin, mil huit cent cinquante-cinq, devant Mre. F. L. Gauvreau, et son confrère, Notaires, il est expressément ordonné que ses enfants, au nombre desquels est l'appelant en cette cause, ne pourraient en aucune manière, engager, affecter, hypothéquer, vendre, échanger, ou autrement, aliéner les biens immeubles étant dans leurs lots respectifs, d'après les partages faits, au dit testament, qu'après vingt ans, à compter du jour du décès du dit testateur; sous peine de nullité de tout actes qu'ils feraient, contraires à la dite intention du testateur.

"Attendu qu'il n'y a rien qui vicie cette condition, qui, à sans doute, été imposée par le testateur, pour de bonnes raisons de prévoyance, de convenance et d'économie domestique.

"Attendu que les seules clauses irritantes dans les dispositions entre-vifs ou testamentaires, sont celles impossibles, ou qui sont contraires aux lois, ou aux mœurs. Que la condition imposée, par un testateur, à sa libéralité dans le but de rendre les immeubles par lui légués insaisissables par les créanciers du légataire, n'est ni impossible, ni prohibée par la loi, ni contraire aux mœurs.

"Attendu que la condition du dit legs n'est rien autre chose qu'une mesure sage et prudente; et que la prohibition d'aliéner doit être réputée équivaloir à une clause d'insaisissabilité temporaire.

(*) Troplong. Donations entre vifs, no. 271; — Demolombe, no. 201, jusqu'à 303.

"Attendu que, par le jugement rendu à Québec, le cinq Mai dernier, (1852), de la Cour de première instance, la dite défense en droit de l'Intimé a été maintenue, et la dite opposition de l'appelant a été renvoyée, il y a mal jugé. Il est ordonné que le dit jugement soit infirmé; et procédant à rendre le jugement du Tribunal, il est ordonné que la dite défense en droit soit renvoyée avec dépens tant en appel que dans la cour de première instance. Et, enfin, il est ordonné remise du dossier à la Cour Supérieure à Québec.

Dissentientibus, Mr. le Juge Duval et Mr. le Juge Meredith.

Jugement infirmé.

Casault, Langlois et Angers, pour l'Appelant.

Belleau et Jolicœur, pour l'Intimé.

(F.W.T.)

SUPERIOR COURT.

MONTREAL, 30TH JUNE, 1863.

Coram MONK, A. J.

No. 2306.

Denis vs. Crawford

Held:—That the *douaire coutumier* does not affect a mere undivided interest or share in real property, where such property is sold by *licitation forcée*, the effect of the licitation being to convert the right of dower on the land to a claim on the moneys resulting from the sale of the property; and this even in the case of a *tiers acquéreur*.

This was an action to recover from the defendant an undivided tenth of a farm owned by him in the vicinity of Montreal. The plaintiff claimed to be the assignee of the widow and children of one Etienne Nivard St. Dizier, who were alleged to be entitled to the property as being affected with the *Douaire Coutumier* resulting from the marriage of Mr. and Mrs. St. Dizier, at the city of New York, in the year 1817; St. Dizier, by right of inheritance, having become proprietor of an undivided fifth of the farm by the death of his father in 1820.

The defendant pleaded several pleas, by the first of which (that on which the fate of the action turned) the defendant alleged:—"That he acquired the real estate in the said declaration described by deed of sale, executed on the 20th day of December, 1842, before Guy and his colleague, notaries public, by the widow and heirs of the late Joseph Chapman, in his lifetime of the City of Montreal, merchant and brewer, to and in favor of the said defendant, as will more fully appear by reference to an authentic copy of such deed of sale herewith produced and filed, and to which the said defendant particularly refers, as forming part hereof.

That the said Joseph Chapman acquired the said real estate at a sale by forced licitation, *licitation forcée*, made and had on the 16th day of February, 1824, in a certain cause, bearing the number 1820 amongst the records of the then Court of King's Bench for the district of Montreal, wherein Etienne Nivard St. Dizier, gentleman, residing in the town of Montreal, in the district of Montreal, was plaintiff, and Dame Marie Anne Magnan, widow of the late Etienne Nivard St. Dizier, Esq., residing in the said town of Montreal, as *commune en biens* with her said hus-

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band, Joseph St. Dizier, gentleman, residing in the said town of Montreal, Miss Emilie St. Dizier, spinster, of the full age of majority, residing in the said town of Montreal, and Miss Marie Anne St. Dizier, spinster, of the full age of majority, residing in the said town of Montreal, were defendants; and Toussaint Pothier, Esq., tutor *ad hoc* to Edouard St. Dizier, minor child, issue of the marriage of the said late Etienne Nivard St. Dizier, Esq., with the said Dame Marie Anne Magnan, residing in the said town of Montreal, was intervening party.

That at the said sale last mentioned, the said real estate was adjudged to the said Joseph Chapman, as the last and highest bidder for the price or sum of £2015 currency, to be used, the said real estate, by the said Joseph Chapman as his own absolute property, *en toute propriété*. As the whole will more fully appear by reference to an authentic copy of the judgment or sentence of adjudication in the said cause rendered, herewith produced and filed, to form part of these presents.

That by reason of the said several premises, and by law, the rights of every kind and description of the said plaintiff Etienne Nivard St. Dizier and of all persons pretending to claim by or through him, or by or through, or as resulting from any pretended marriage with him, ceased from and after the date of such adjudication aforesaid, to be upon or to the said real estate or any portion thereof or in anywise whatever to effect the same, and thereupon became rights to or affecting such portion of the said price or adjudication money as the said Etienne Nivard St. Dizier was by law entitled to, and that consequently the pretended right to customary dower, *douaire coutumier*, upon the said real estate, pretended to be claimed by the present action, by reason of an alleged pretended marriage between the said Etienne Nivard St. Dizier and one Mary Ann Jerinys, did not, at the time of the institution of this action, and does not now, in any way affect the said real estate so purchased and acquired as aforesaid by the said defendant."

OUIMET, for plaintiff, argued, (after stating pleadings and facts) that what the defendant really relied on here was, that the *licitation forcée* purged the land of the dower, a pretension that was wholly unfounded in law. The procedure invoked could not produce any greater effect than a *décret*; and the dower not being open at the time of the adjudication it was quite clear that neither a *décret* nor a *licitation* could purge the land of the right. He then referred the Court to the Consolidated Statutes of L. C., ch. 43, s. 5, 6 vol.; 6 Toullicr, p. 511, No. 610; Grande Coutume, 3rd vol., pp. 680, 730, 764, 765; Pothier, *Douaire*, Nos. 83, 84, to No. 94, also No. 248; 2nd Bourjon, p. 525, Nos. 16 and 17, and page 721; 1st Pigeau, p. 720; 2nd Pigeau, p. 475; Guyot, *Répertoire*, *Verbo* *Licitation*, p. 530; and the *Ancien Denizart*, *verbo* *Licitation*, p. 149, No. 17. He admitted, however, that had the defendant's *auteur* been a *copartageant*, he in all probability, would have had a right to urge that the dower had ceased with the sale of the property.

BETHUNE, for defendant, submitted the following points:—

1. The claim of the plaintiff (as the pretended assignee of the rights of the widow and children of one Etienne Nivard St. Dizier) is, that the property held by the defendant "*soit déclaré affecté et sujet au douaire coutu-*

"mier," referred to in the declaration "*et le demandeur déclaré propriétaire de la moitié indivise d'un cinquième du dit immeuble.*"

The declaration alleges that the marriage of the said Etienne Nivard St. Dizier took place at the City of New York, in 1817; and that, by the death of his father in 1820, he became, by right of inheritance, a proprietor of an undivided fifth of the property in question.

On the part of the defendant it is pleaded and proved, that the property in question was sold by *licitation forcée* on the 16th of February, 1824, in a suit in which the said Etienne Nivard St. Dizier and his co-heirs were parties, and adjudged to one Joseph Chapman, one of the defendant's *auteurs* for £2015 currency "to be used, the said real estate, by the said Joseph Chapman, as his own absolute property, *en toute propriété.*" And the pretension of the defendant (as stated in his pleas) is:—"That by reason of the said several premises and by law the rights of every kind and description of the said Etienne Nivard St. Dizier and of all persons pretending to claim by or through him, or by or through, or as resulting from any pretended marriage with him, ceased from and after the date of such adjudication aforesaid, to be upon or to the said real estate or any portion thereof, or in anywise whatsoever to affect the same, and thereupon became rights to or affecting such portion of the said price or adjudication money as the said Etienne Nivard St. Dizier was by law entitled to. And that, consequently, the pretended right to customary dower, *douaire coutumier*, upon the said real estate, pretended to be claimed by the present action, by reason of an alleged pretended marriage between the said Etienne Nivard St. Dizier and one Mary Ann Jermys, did not, at the time of the institution of this action, and does not now, in any way affect the said real estate so purchased and acquired as aforesaid by the said defendant."

The general principle of law invoked here by the defendant is, that the right of an heir in the property of a succession is a mere *droit indéterminé* until after the *partage* of the estate, and that he is not considered to have been ever *seized* of anything else than what may happen to fall to his lot: even if the result of the *partage* be to deprive him entirely of any share of the real property of the succession and to give him nothing but money. And, as a consequence, that all *hypothèques* and privileges and rights generally, created in respect of his undetermined share in the real property of the succession, vanish and become extinct, (so far as such real property is concerned) when the result of the *partage* is to leave him nothing but moveables:—

Pothier, Succession, chap. 4, article 5, sec. 1, pages 206, 207, Qrto. Ed.

1st Vol. Les Principes de la Jur. Fr., par M. Prévôt de la Jannés, page 100, No. 84.

2nd Vol. Do., page 115, No. 390, 2nd par., page 117, No. 393.

1st Vol. Argou, Liv. 2, ch. 28, page 508, 2nd, par.

1 Troplong (vente) No. 176, page 248.

1 Bourjon, 2nd part of the *Titre des suc.* chap. 11, sec. 3, Nos. 35 and 36, page 690.

Demolombe, 5th vol., successions, No. 304, et, seq.

Guyot vo. *Licitation*, page 540, 2nd column, 2nd par.

2nd Pigeau, pages 461, 469, 470.

3rd Valin, Cout. de la Rochelle, pages 210, 211, Nos. 213, 214, 215.

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It is admitted in argument, by the plaintiff's counsel, that the general principle invoked is applicable as amongst the *copartageans* themselves, but he contends that it cannot be made to apply to the case of a *tiers acquéreur*. In support of which proposition reliance is mainly had on the following authorities :

2nd Pigeau, page 475.

3rd Vol. Grand Cout., page 739, No. 10.

2nd Bourjon, Tit. 5, sec. 3, Nos. 15, 16, and 17, pages 525, 526.

No one can deny that the first citation contains a short authoritative statement in support of the plaintiff's proposition.

Bourjon, however, in stating in No. 17 that he considers the *tiers acquéreur* has a right to retain the purchase money as a protection against the customary dower of such of the *co-licitans* as may be married, (implying, therefore, that the licitation has in no way affected such dower), bases his remark in this respect on the proposition he lays down previously in No. 15, that the effect of an adjudication (*no matter to whom*), is a proceeding *en licitation* is not to affect the *hypothèques du chef des co-licitans* in any way "*elle laisse* (he says) *donc subsister toutes les hypothèques.*" And Ferrière, in the citation relied on from the *Grande Coutume*, goes further, and contends (in opposition to all the authorities cited by defendant) that the rights of the wife cannot be affected even by an ordinary *partage*. But he is obliged to admit that Maître Duplessis holds (on the contrary) that the only recourse is a claim to recompense out of the portion of the husband's estate not subject to the dower, and that if the estate prove insolvent, the wife and her children "*ne peuvent pas en faire révoquer le partage.*"

In the citation from Valin, already made, (No. 215) the fact that Bourjon (although agreeing, as per citation above made from first volume, with other writers as to the legal effect of an ordinary *partage* on the *hypothèques*, &c., created by each heir) holds the opinion, that in cases of *licitation* a different rule ought to prevail, is noticed :—Valin, however, laying down the rule to be, "*par identité de raison il en faut dire autant de la licitation, puisqu'elle est supplétive à partage.*"

Reference may perhaps properly be made here to Demolombe, who (although holding that the general effect of a licitation is not the same in the case of a stranger purchasing as in that of one of the *co-licitans* becoming *adjudicataire* (5 vol. No. 272, page 325.) nevertheless draws the distinction as regards the hypothecary creditors of the *co-licitans*, and shews incontestably that they can only claim on the price of adjudication and are not "*fondés à faire au tiers adjudicataire sommation de payer ou de délaisser,*" (5 vol. No. 274, pages 327, 328, 329) and at page 329 he points out that, inasmuch as the purchaser would have a plain remedy in *garantie* against all the heirs should the hypothecary creditors be held entitled to disturb him, the effect of the exercise of such a remedy would be to destroy all that the law intended should be produced by the *partage* of a succession.

It is also argued by plaintiff's counsel, that however much a licitation may affect ordinary *hypothèques* the effect of customary dower can in no degree be affected by it. On this point reference is respectfully submitted to the following autho-

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rities:—2nd vol. *Prévôt de la Jan.* page 15, No. 390, 2nd par. (under the article *Douaire*) in speaking of the properties derived by direct succession (as in this case), the author says:—"mais il n'est censé succéder qu'à ceux qui lui sont échus par le partage avec les co-héritiers." and at page 118, No. 383, he says: "*L'espérance et le droit de la femme pour son douaire est aussi éteint soit par l'éviction de l'héritage qui y est sujet, ou la RESOLUTION DU DROIT QUE LE MARI Y AVAIT.*"

Lebrun (liv. 2, ch. 5, s. 1, Dist. 2, page 317, Nos. 1 and 2) says that the dower may suffer *préjudice* by the *éviction* of the husband from the property apparently affected, by reason of an *aliénation nécessaire*, which he says may be of four kinds; amongst the third of which he classifies that of the *licitation entre co-héritiers, ou co-propriétaires*. And at page 320, No. 17, he again refers to the *licitation* as so affecting the dower as to give rise to *récompense à la veuve par les héritiers du mari de ce que la licitation soustrait au douaire*. Rousseaud de Lacombe, in his *Recueil de Jur.*, vo. *Douaire*, page 238, No. 8, says also, that, *récompense* is due to the widow by the husband's heirs, *de ce que la licitation soustrait au douaire*. Pothier in his treatise on successions (*lococitato*), makes no distinction between an ordinary *partage* and a *licitation*, and when treating specially on the subject of dower, (No. 94, page 41, Qrto. Ed.), says, that where the property held by the husband in common with others is adjudged to a person other than the husband, the dower is converted into a claim on the money that the husband "*à en pour sa part dans le prix de la licitation.*" And he says with reference to a stranger purchasing,—"lorsque c'est un étranger qui s'est rendu ADJUDICATAIRE la femme NE PEUT pareillement EXERCER SON DOUAIRE QUE SUR LA PART DE SON MARI DANS LE PRIX DE LA LICITATION." He also adds (corroborative of what Lebrun says) that "*la licitation est une aliénation NECESSAIRE,*" and that for that reason alone, "*l'héritage cesse d'être sujet au douaire, lequel est transféré au prix.*"

And the *Nouveau Denisart*, vo. *douaire*, page 194, No. 14, endorses to the letter Pothier's statement of the law as specially applicable to the present case.

2. The marriage of Etienne Nivard St. Dizier is not legally proved, in this, that the certificate produced, although (as testified by the professional witnesses examined at New York) it would be received in the New York Courts as "legal evidence" would not amount to "conclusive proof of the marriage."

2. The share of *Victoria St. Dizier* (a minor) has never been legally assigned.

The following was the judgment of the court:—"The Court. * * * *
"considering that the plaintiff has failed to prove the essential allegations of his declaration, and that the defendant hath, by legal and sufficient evidence, established the allegations and averments of his defence, and that the said defence is well founded in law, doth dismiss the action of the said plaintiff, with costs."

Action dismissed.

Quimet, Morin & Marchand, for Plaintiff.

Strachan Bethune, for Defendant.

(s. n.)

SUPERIOR COURT.

MONTREAL, 29th SEPTEMBER, 1863

Coram BERTHELOT, J.

No: 2265.

FLECK

vs

STARNES, et al. and ST. CYR T. S., and BROWN, *intervening party*.

Held:—That it is not competent for the Sheriff, in a case of *saisie arrêt en main tierce*, to seize corporeally as the property of the defendant effects in the hands of a third party, and a seizure so made is null and void and will be quashed and set aside, on motion made to that end by any party legally interested.

This was a motion by the intervening party that the seizure made in this cause by the Sheriff of a quantity of Railroad Iron, in the possession of the *Tiers Saisi*, and claimed by the intervening party as his property, as alleged in his intervention, be quashed, annulled and set aside with costs to the intervening party, on the ground that the effects were corporeally seized as the alleged property of the Defendants in the hands of the *Tiers Saisi*, a procedure wholly unjustifiable and illegal under the circumstances; the duty of the Sheriff in such a case being limited to simple service of the writ of attachment on the *Tiers Saisi*. And in support of the motion reliance was had on the doctrine laid down by the late Chief Justice Reil, in pronouncing the judgment of the Court of Appeals, in the case of Wood and Gates, Stuart's Reports, p. 536.

Per Curiam:—It is impossible that the Court can sanction such a course as has been resorted to in the present case. It would appear, that the Sheriff, in the case of an attachment *en main tierce*, not content with the mere service of the writ on the *Tiers Saisi*, which was all he could do legally, has ventured, at the suggestion apparently of the Plaintiff, to seize corporeally in the possession of the *Tiers Saisi* a large and valuable quantity of iron, on the pretence that it was the Defendant's property. Such a proceeding is entirely illegal, and the seizure under the circumstances, is a nullity. The motion, therefore, made by the intervening party, who claims by his Intervention to be the owner of the property seized, is maintained with costs.

Motion granted.

Cross & Lunn, for Plaintiff.*Lafrenaye & Armstrong*, for Defendants.*Strachan Bethune*, for Intervening party.

(S. B.)

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COUR DU BANC DE LA REINE, EN APPEL.

MONTREAL, JUIN 1863.

Coram Aylwin, J ; Duval, J ; Meredith, J ; Berthelot, J. A.

JOSEPH DOUTRE, *ex parte*.

Opposant en Cour Inférieure.

APPELANT.

et

WILLIAM ELVIDGE.

Demandeur en Cour Inférieure.

INTIMÉ.

JUGE:—1o. Que le Shérif ne donne à l'adjudicataire un titre valable à l'immeuble décrété qu'en autant que la vente a lieu *super domino*.

2o: Que la description par contenance, insérée dans les annonces du Shérif dans ce cas, n'est pas une garantie de la quantité offerte en vente et réellement vendue.

3o: Que le Demandeur, à la poursuite duquel le décret a eu lieu, peut faire saisir et vendre le même ou partie du même immeuble, vendue à sa propre poursuite, si la première vente a eu lieu *super non domino*.

Le jugement dont il y avait Appel avait été rendu, dans la Cour Supérieure, à Nelsonville, district de Bedford, par Son Honneur M. le Juge-McCord, le 13 Octobre 1862, et était conçu dans les termes suivants :

"The Court having heard the parties by their Counsel on the merits of the Contestation of the Opposition by the said Opposant in this cause filed, examined the pleadings and evidence of record and duly deliberated, it is adjudged that the Opposition of the said Opposant be and the same is hereby hence dismissed with costs *distracts* in favour of James O'Halloran, Esquire, Attorney of the said Plaintiff and Contestant."

En vertu d'une Exécution émanée de la Cour Supérieure, district de Bedford, dans une cause No. 170, où l'Intimé était Demandeur contre John B. Reynolds, le Shérif saisit divers immeubles, comme appartenant au Défendeur et entr'autres le suivant, savoir :

"*Firstly.* The equal undivided half of the south half of a certain tract of land known as lots numbered seventeen and eighteen of the first range of Foucault or Allard's Manor; bounded the whole of the said tract as follows, to the north by lot number nineteen, to the south by lot number sixteen, towards the east by lot number thirty-eight, in the second range, and by other lots in the said second range, containing, said undivided half of said south half of said lot, forty-nine acres half a rod and twelve perches in superficies, more or less—with also all the buildings that may stand erected on the undivided piece or parcel of land and premises."

C'est à la saisie et vente de l'immeuble ci-dessus décrit, que l'Appelant, en sa qualité d'Exécuteur testamentaire de feu Pierre Doutre, forma son Opposition afin de distraire, fondée sur les allégués suivants : Que par un acte de vente, après décret, fait au dit feu Pierre Doutre, par David Browne, Shérif du district de Bedford, passé le 29 Décembre 1859 il fut déclaré comme suit, en langue anglaise :

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"Whereas on the 8th day of July 1859, a certain Writ of Execution of Our Lady the Queen, was issued out of the Circuit Court for the District of Bedford, holding civil pleas in the said District, at the suit of William Elvidge, of the Parish of St. Rémi, in the District of Iberville, farmer, Plaintiff against the lands and tenements of Lucy Adela Reynolds, wife of Jacob Young the third, of the Parish of St. Thomas, farmer, and by the said Jacob Young the Third thereto present and specially authorized for all and every the purpose thereof, and Jacob Young the Third, Defendant, to me, (said Sheriff) directed, which said Writ afterwards, to wit : on the said 8th day of July 1859, was to me delivered in due course of law to be executed, by virtue of which said writ I, the said Sheriff, did seize in my hands and take in execution as belonging to the said Defendants : "The equal undivided half of the south half of a certain tract of land known as lots number seventeen and eighteen of the first range of "Foucault or Allard's Manor ; bounded the whole of the said tract as follows : "to the north by lot number nineteen, to the south by lot number sixteen, "towards the west by the River Richelieu, and towards the east by lot number "thirty-eight in the second concession, and by other lots in the said second concession, containing said undivided half of said south half of said lots, forty "nine acres half a rod and twelve perches in superficies more or less, with also "all the buildings that may stand erected on the said undivided piece or parcel "of land and premises," and

"Whereas I, the said Sheriff, having so seized into my hands, and taken the said undivided piece or parcel of land and premises in execution, did cause the same to be advertised and published according to law, to be sold and adjudged to the highest bidder, at the parochial church door of the Parish of St. Thomas, on the 14th day of December instant, at the hour of ten of the clock in the forenoon, and the said undivided piece or parcel of land and premises being then and there put up to sale in the usual manner, Pierre Doutre, of the City of Montreal, Esquire, Advocate, became the purchaser thereof, being the best and highest bidder at and for the price or sum of one hundred and sixty-one pounds current money of the Province of Canada aforesaid.

"Now in order to convey the said undivided piece or parcel of land and premises and to confirm the purchase thereof to the said Pierre Doutre, his heirs and assigns, know all men by these presents, that I, the said David Browne, Sheriff, as aforesaid, by virtue of the said Writ of Execution and of my said office, and for and in consideration of the said sum of £161. 0. 0. to me by the said Pierre Doutre, at or before the execution hereof, in hand paid, the receipt whereof I do hereby acknowledge, and therefore do acquit and discharge the said Pierre Doutre, his heirs and assigns, have granted, bargained, sold and conveyed, and by virtue of the said Writ of Execution and these presents do, as much as in me is, and I lawfully may grant, bargain, sell and convey to the said Pierre Doutre, his heirs and assigns, all the said undivided piece or parcel of land and premises herein before mentioned, situate, lying and being as aforesaid, and also all and singular the right, title, interest, property, claim and demand whatsoever, of me the said Sheriff, by virtue of the Writ of Execution aforesaid, of in and to the same and every part and parcel thereof, to have and

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to hold all the said piece or parcel of land and premises in and by these presents bargained, sold and conveyed, and every part and parcel thereof, with all and every of its appurtenances unto the said Pierre Doutre, his heirs and assigns, to the only proper use, benefit and behoof of the said Pierre Doutre, his heirs and assigns for ever, and to and for no other use, intent or purpose whatever, under such rents, duties, dues and services as the said undivided piece or parcel of land and premises may be subject to and liable for, "—ainsi que le tout apparaissait plus amplement au dit titre, produit avec l'Opposition; que le dit feu Pierre Doutre étant en possession légale et réelle du dit immeuble, en vertu du titre en question avait, le 16 Janvier 1860, vendu le même immeuble à David S. Clark; que le 22 décembre 1860, le dit Pierre Doutre fit son testament instituant l'Appelant son exécuteur testamentaire; que le 9 février 1861, le dit Pierre Doutre est mort; que le dit David S. Clark ayant négligé ou refusé de payer son prix d'achat, l'Appelant avait obtenu, le 30 Mars 1861, un Jugement devant la Cour Supérieure à Montréal, révoquant le dit acte de vente et réintégrant l'Appelant dans la propriété et la possession du dit immeuble; que le dit immeuble vendu, comme dit est, par le Shérif au dit feu Pierre Doutre, puis revendu par ce dernier au dit D. S. Clark et remis à l'Appelant par le dit Jugement, était le même que celui saisi en premier lieu (*firstly*) par l'Intimé, sous la même description que celle contenue dans le titre du Shérif,—et que l'Appelant était bien fondé à demander que le dit immeuble fût distrait de la dite Saisie.

L'Appelant produisit avec son Opposition tous les documents auxquels il y était fait allusion.

L'Intimé contesta cette Opposition avec les moyens suivants: Que le 12 Mars 1850, John Greene, qui était alors en possession, comme propriétaire, de tout le morceau de terre, dont la moitié indivise maintenant saisie faisait partie, avait avec Lucy Bissell, sa femme, par deux actes de vente portant la même date, l'un en faveur de Jacob Young the Third, l'autre en faveur de Lucy Adela Reynolds, sa femme, vendu au dit Jacob Young the Third, avec une plus grande étendue de terrain la moitié indivise du morceau de terre décrit et réclamé par l'Appelant; et à Lucy Adela Reynolds l'autre moitié indivise du même morceau de terre, avec une plus grande étendue,—de sorte que les dits Jacob Young et sa femme devinrent propriétaires, par indivis, du morceau de terre réclamé par l'Appelant, dont une moitié indivise est saisie en cette cause; que ces ventes furent faites pour le prix de \$850 pour chaque partie, avec hypothèque de bailleur de fonds; que le 20 Janvier 1856, le dit John Greene avait transporté au demandeur, la somme de £187 10 0 à lui due, par Jacob Young, pour balance du dit prix de vente, 20 une même somme de 187 10 0, à lui due par Lucy Adela Reynolds, pour balance du dit prix de vente; que cette dernière ayant négligé de payer le dit prix de vente, l'Intimé avait obtenu, en vertu du dit Transport, un Jugement en exécution duquel il avait fait saisir et vendre la moitié indivise du morceau de terre dont l'autre moitié indivise est maintenant sous saisie en cette cause; que le Shérif n'a vendu au dit Pierre Doutre que la moitié indivise appartenant à l'épouse de Jacob Young; que ce dernier ayant aussi négligé de payer, l'Intimé avait obtenu jugement contre le Défendeur en cette cause, comme tiers-détenteur de la dite moitié indivise appartenant ci-devant à Jacob Young, en

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exécution duquel jugement la saisie en cette cause avait été pratiquée; que le dit Pierre Doutre n'avait acquis que la moitié appartenant à Lucy Adela Reynolds et que la moitié appartenant à Jacob Young restait à vendre.

A ces moyens de contestation, l'Appelant répondit: Que lors de la vente du 14 Décembre 1859, le dit feu Pierre Doutre avait acheté un corps certain, "*containing said undivided half of said south half of said lots, forty nine acres half a rod and twelve perches in superficies, more or less, with also all the buildings that may stand erected on the undivided piece or parcel of land and premises*": que ni le dit Pierre Doutre ni aucun des enchérisseurs à la dite vente, n'était tenu de savoir l'étendue de tout le morceau de terre contenant la portion indivise mise en vente; que le seul intérêt qu'avait le dit Pierre Doutre, ainsi que tout autre enchérisseur était de connaître l'étendue ou la quantité du terrain offert en vente, laquelle étendue ou quantité était de 40 acres, une demi *rod* et 12 perches: que depuis les acquisitions faites, en 1856, de John Greene par Jacob Young et sa femme, les dits 40 acres, avec les bâtisses érigées avaient été en la possession commune de ces derniers; que le Jugement obtenu en cette cause contre le Défendeur John B. Reynolds avait été obtenu par fraude et déception; que le dit Jugement étant, quant à l'Appelant, *res inter alios*, ne pouvait pas être mis à exécution contre les intérêts de l'Appelant; que le Défendeur n'avait jamais possédé le dit immeuble et ne pouvait pas être appelé à le délaisser en justice; qu'en conséquence le Jugement dont l'Intimé poursuivait l'exécution était nul et sans valeur à l'égard du dit immeuble et de l'Appelant; qu'après la vente faite par le Shérif au dit Pierre Doutre, le 14 Décembre 1859, de 49 acres, une demi *rod* et 12 perches de terre, il ne restait plus, dans le premier rang de Foucault, aucun terrain appartenant à Jacob Young, sa femme ou le Défendeur; qu'un jugement ayant été rendu à Nelsonville, par la Cour de Circuit, le 21 Juin 1859, dans une cause où Ira Taylor était Demandeur contre le dit Jacob Young the Third, une exécution contre les terres de ce dernier serait émanée de la dite Cour dans la dite cause et le Shérif aurait saisi (entr'autres choses) le dit morceau de terre, savoir les quarante-neuf acres, une demi-*rod* et 12 perches qui avaient été précédemment vendus au dit Pierre Doutre; que le jour de la vente, dans la dite cause de Taylor contre Young, savoir le 7 Mars 1860, le Demandeur (l'Intimé) étant présent, enchérisseur et même acquéreur de l'un des lots saisis (le lot No. 2) le Shérif aurait à la connaissance et du consentement de l'Intimé, refusé de mettre en vente le morceau de terre décrit No. Un (*firstly*) dans son Procès-Verbal, savoir les 49 acres et une demi *rod* et 12 perches, en question en cette cause "*for the reason that the said described lands and tenements being parcel number one had been previously sold by me*" (par lui, le dit Shérif,) by virtue of a Writ of *Fieri Facias* issued out of the "Superior Court (Circuit) for the District of Bedford, number fifty-two, where-
"in William Elvidge was Plaintiff and Lucy A. Reynolds wife of Jacob Young
"the Third was Defendant," faisant par là le dit Shérif, allusion à la vente faite au dit Pierre Doutre et affirmant qu'il lui avait vendu le dit morceau de terre; que depuis la vente faite par le Shérif, au dit Pierre Doutre, les dits 40 acres, une demi-*rod* et 12 perches de terre avaient été possédés successivement et sans interruption par le dit Pierre Doutre, puis par le dit David S. Clark et ensuite

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par l'Appelant jusqu'à la saisie faite en cette cause et ce à la connaissance de l'Intimé et que depuis 1858 jusqu'à la vente par le Shérif au dit Pierre Doutre le dit terrain avait été possédé par les dits Jacob Young et sa femme, et que depuis 1856 le dit Défendeur n'en avait rien possédé; que John Greene et sa femme, les vendeurs des dits Jacob Young et Lucy Adela Reynolds n'ont jamais possédé plus des dits 49 acres une demi-rod et 12 perches, sur les lots No 17 et 18 du premier rang de Foucault; qu'il appert de ce qui précède que le Shérif ne pouvait saisir aucune terre répondant à la description contenue en premier lieu (*firstly* au Procès-Verbal,) sans saisir la terre de l'Appelant et qu'en conséquence la saisie faite est nulle.

En addition à ce qui précède, l'Appelant répondit que s'il avait été commis aucune erreur soit dans la saisie ou dans la vente où le dit Pierre Doutre est devenu adjudicataire, le Demandeur (l'Intimé) était légalement responsable de telle erreur, étant le Demandeur dans la cause où la vente était faite au dit Pierre Doutre et telle vente étant faite à sa poursuite et pour son avantage, le dit Intimé ayant de plus touché la plus grande partie du produit de la dite vente, en vertu du Jugement de distribution qui s'en est suivi: que l'Intimé était de fait le garant de l'Appelant contre toute telle erreur, ou fausses directions dans les procédés du Shérif; qu'en supposant que le dit Pierre Doutre n'ait acheté que la moitié de 49 acres (ce que niait l'Appelant), il croyait évidemment acheter 49 acres, tel qu'annoncé,—et que l'Intimé ne pouvait avoir aucun intérêt à faire vendre l'autre moitié, attendu que dans ce cas, il serait tenu, comme garant de l'adjudicataire, de rembourser à l'Appelant la moitié du prix payé par le dit Pierre Doutre au Shérif.

Sur l'ordre d'office de la Cour, un arpenteur est allé sur les lieux et a fait un plan, d'après lequel il paraît que la moitié des Nos. 17 et 18 ne contenait que la quantité offerte en vente, savoir 49 acres, etc.

Il est hors de doute, dit le *factum* de l'Appelant, que la description de l'immeuble, vendu par le Shérif à feu Pierre Doutre le 14 Décembre 1859, était vicieuse, comme l'est aussi la description de l'immeuble saisi en cette cause. Il est de fait que les Nos. 17 et 18 ne sont que d'à peu près cinquante acres chacun, en sorte que la moitié indivise de la moitié de 100 acres ne pouvait jamais former 49 ou 50 acres. On trace cette erreur jusqu'aux actes de vente par John Greene à Jacob Young d'une part et Lucy Adela Reynolds de l'autre. On voit dans ces actes que Greene vend séparément au mari et à la femme une égale moitié indivise de la moitié indivise des lots Nos. 17 et 18,—laquelle moitié indivise de la moitié indivise contient 49 acres, etc. L'Intimé est en possession de ces actes et c'est là sans doute qu'il a puisé la section donnée au Shérif. Si le Shérif eut été laissé à lui-même, avec l'ordre donné par la Cour de saisir les biens de Jacob Young ou de sa femme, il ne lui serait jamais venu à l'idée de saisir d'après une description artificielle ou conventionnelle une propriété dont il pouvait mesurer l'étendue. Le Shérif eut constaté, sur les lieux, ce que l'arpenteur a trouvé, c'est-à-dire que Jacob Young et sa femme n'avaient jamais possédé que 50 acres à eux deux. L'Intimé a été l'auteur de cette erreur, tant dans la saisie où Pierre Doutre s'est rendu adjudicataire, que dans la présente cause, où l'on retrouve le même vice de description. Pierre Doutre a-t-il acheté 49 acres, une demi rod et 12 perches? La chose est indubitable.

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On ne peut pas vouloir que des tiers, se rendant à une vente judiciaire, se fassent accompagner d'un arpenteur pour vérifier les calculs du mesurage de l'officier préposé aux décrets. Les tiers ne doivent s'attendre à d'autres risques que ceux résultant du *plus ou du moins*, dans les ventes ordinaires.

Pour se convaincre que Pierre Doutre a bien acheté 49 acres une demi *rod* et 12 perches, nous avons le meilleur témoignage possible, attendu qu'il procède de l'officier de la Cour (le Shérif) et que ce témoignage n'a été sollicité en aucune manière. Ce témoignage se trouve dans le rapport fait par le Shérif, sur l'exécution émanée dans la cause de Ira Taylor contre Jacob Young the Third. Là aussi le Shérif avait reçu de fausses directions, dans la description des immeubles à saisir; mais il n'avait pas encore eu l'occasion de s'apercevoir de l'erreur qu'on lui faisait commettre. C'est le 25 Octobre 1859, que le Shérif procède à la saisie, dans la cause de Taylor et ce n'est que lors de la vente à Doutre, le 14 Décembre 1859, qu'il s'aperçoit du vice de description; et quand il arrive à la vente, *in re Taylor & Young*, le 7 Mars 1860, il déclare qu'il ne vend pas le numéro Un, pour la raison qu'il l'a déjà vendu, dans la cause où William Elvidge était demandeur contre Lucy Adela Reynolds.

Dans la confusion que tendait à créer les termes "*The equal undivided half of the south half*," la quantité assignée à l'immeuble était le seul trait de lumière sur lequel les tiers pouvaient s'orienter;—et que dit le Shérif relativement à l'étendue de l'immeuble offert en vente? Il dit que la partie vendue contient 49 acres, une demi *rod* 12 perches;—*containing said undivided half of said south half of said lots forty nine acres half a rod and twelve perches*.

L'Intimé, malgré ces expressions positives, persiste à dire que la moitié seulement de cette quantité a été vendue à Pierre Doutre. Mais ce qui tendait encore d'avantage à faire croire aux enchérisseurs que c'était 49 acres qui étaient vendus, c'est que toutes les batisses, et non une partie indivise, sont mises en vente, "*with also all the buildings that may stand erected on the said undivided piece or parcel of land and premises*." (1)

(1) La description de l'immeuble est identiquement la même, dans la vente faite à feu Pierre Doutre, et dans la saisie contre laquelle l'opposition de l'Appelant a été faite, ainsi qu'on peut le voir en comparant comme suit :

Vente du Shérif à Pierre Doutre du
29 Décembre 1859.

"The equal undivided half of the south half of a certain tract of land known as lots numbers seventeen and eighteen of the first range of Foucault or Allard's Manor, bounded the whole of the said tract as follows: to the north by lot number nineteen, to the south by lot number sixteen, towards the west by the River Richelieu, and towards the east by lot number thirty-

Procès Verbal de saisie *in re Wm. Elvidge vs. J. B. Reynolds, J. Doutre opposant*.

"The equal undivided half of the south half of a certain tract of land known as lots numbers seventeen and eighteen of the first range of Foucault or Allard's Manor, bounded the whole of the said tract as follows: to the north by lot number nineteen, to the south by lot number sixteen, towards the east by lot number thirty-eight in the second range, and by other lots in the said second range

La conduite de l'Intimé est bien propre à faire douter si ces erreurs sont tout à fait involontaires. Était-ce dans le but d'écarter la concurrence et de devenir le seul enchérisseur possible que cette confusion est maintenue dans les saisies ? Ce qui est certain c'est que le Jugement originaire, dans la présente cause, le même jugement dont il poursuivait l'exécution, sur la propriété de l'Appelant,—il est certain que ce Jugement a été obtenu par fraude ; que le Défendeur Reynolds n'a jamais possédé aucune partie du dit immeuble ; qu'à l'époque où ce jugement fut rendu (13 Février 1861) David S. Clark, qui avait acheté de feu Pierre Doutre, était en possession actuelle et ouverte, par l'entremise de son locataire, le témoin Westover. Accusé d'avoir obtenu ce Jugement frauduleusement, l'Intimé n'a pas fait la plus légère tentative pour repousser l'accusation. Il laisse en preuve, sans contradiction, le fait que Reynolds, un étranger qu'il a capricieusement choisi comme Défendeur, dans les États-Unis n'a jamais possédé l'immeuble en question. S'il avait une action hypothécaire à exercer c'était contre le dit Pierre Doutre où ses représentants qu'il eut fallu agir. Redoutant sans doute l'exception de garantie qui lui aurait été opposée, il a cru tourner la difficulté en poursuivant un étranger, qui ne pouvait avoir aucun intérêt à le gêner.

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La responsabilité du Demandeur poursuivant le décret, solennellement consacrée par un jugement de cette Cour dans la cause de Desjardins et la Banque du Peuple ; cette responsabilité admise, dans les cas analogues à celui-ci, devait avoir comme conséquence directe de soumettre l'Intimé à l'obligation de garantir l'Appelant contre le trouble qu'il aurait pu éprouver de la part des tiers,—et le Jugement de la Cour inférieure la méconnaît dans un trouble causé par le garant lui-même !

Il est impossible que le système de la Cour Inférieure et la doctrine consacrée par cette Cour, dans la cause de Desjardins, puissent co-exister concurremment. En appliquant la doctrine de cette Cour, le Jugement de la Cour Inférieure ne peut recevoir d'exécution utile, puisque si l'Appelant perdait la moitié de l'immeuble qu'il a cru acheter, l'Intimé serait contraint de rembourser la moitié du prix de vente payé au Shérif. Pour corriger l'erreur, dont l'Intimé est seul coupable et responsable, on ouvrirait la porte à de nouveaux litiges, où l'Appelant chercherait à se faire indemniser d'une porte occasionnée par la faute de l'Intimé.

La vente faite à feu Pierre Doutre par le Shérif, a reçu la consécration du fait accompli, par une possession de trois ans et l'Appelant espère que cette Cour verra, dans le maintien de cet état de choses, l'application des vrais principes, le respect dû aux décrets et la satisfaction des fins de la justice.

eight in the second concession, containing said undivided half of said south half of said lots forty-nine acres half a rood and twelve perches in superficies more or less, with also all the buildings that may stand erected on the said undivided piece or parcel of land and premises.

containing said undivided half of said south half of said lots forty-nine acres half a rood and twelve perches in superficies more or less, with also all the buildings that may stand erected on the undivided piece or parcel of land and premises.

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AUTORITES DE L'APPELANT:

REVUE DE JURISPRUDENCE, T. 2. p. 57, Grey vs. Todd.

Défaut de contenance, en matière de décret, donne lieu à la diminution du prix.

THIBAUT, Traité des Ordes, p. 302, No. 15.

GUYOT, Rép. Vo. Ajudication, pp. 168, 169.

NOUVEAU DENISART, Vo. Décret, p. 46, No. 3.

HENRY, T. 2. p. 548—Question LXXXV.

No. 3, "En troisième lieu, d'autres font distinction entre la vente volontaire et celle qui est nécessaire, et qui se fait par décret judiciaire. Ils veulent que la première commençant à *corpore*, l'acheteur ne puisse pas obliger le vendeur à maintenir la contenance : Mais en la seconde, ils rendent la condition d'un adjudicataire plus favorable, possible parcequ'il s'assure sur la foi publique, et que le décret comprenant d'ordinaire plusieurs héritages, la connaissance en est plus malaisée ; c'est en un mot, parcequ'il ne peut prendre autre pied que celui de la contenance qu'il voit déclarée dans les placards. N'importe que les confins soient réservés ; car nonobstant cette relation, il est plus aisé de se tenir à une contenance certaine, et de faire fondement sur icelle, que de vérifier divers confins, qui le plus souvent sont incertains. C'est à quoi semble se ranger Tronçon sur l'art. 346 de la coutume de Paris."

No. 5. "Ayant été consulté sur ce point au sujet des héritages de Pierre Marraud, vendues en la Sénéchaussée de Riom, nous fumes d'avis que l'adjudicataire était bien recevable à se plaindre du défaut qui se trouvait en la contenance, et que c'est sur le prix qu'il devait obtenir son remplacement ou dédommagement, et pour les frais, qu'il devait être renvoyé contre le poursuivant ou contre les opposants qui le lui contestaient. *C'est parce que le saisissant ayant failli en la contenance, il devrait porter les frais qu'il causait par sa faute ;* mais pour le remplacement ou dédommagement, il n'est pas juste qu'il tombe sur lui, et il faut qu'on le prenne sur le prix. C'est parce qu'on présume que si l'adjudicataire n'avait cru que la contenance fût telle que les placards portaient, il n'aurait pas fait une enchère si haute ; par conséquent que l'erreur ayant fait augmenter le prix c'est sur lui qu'elle doit être réparée, etc., etc., etc."

"Nous ajoutons que les ventes judiciaelles ne se règlent pas toujours comme les volontaires ; et qu'au lieu qu'en celles-ci on se fie à la foi d'un particulier, en celles-là on contracte sur la foi publique et sur l'assurance des placards. Quoique communément un acheteur n'achète pas au hasard et qu'il soit présumé s'enquérir de la chose, *il serait toutefois trop rude de vouloir astreindre un adjudicataire à vérifier tous les fonds et ce qu'ils contiennent.* Aux décrets qui se font à Paris, tous ceux qui enchérissent n'ont pas vu les héritages, et sans savoir au vrai, ils s'en assurent sur les placards et sur la saisie," etc., etc., etc."

No. 6. "Aussi nous avons été assuré que la plainte de l'adjudicataire fut jugée raisonnable."

Idem, p. 550. "Si l'acquéreur par décret peut agir en garantie contre le poursuivant, quand la quantité d'héritages ou de mesure contenue dans les affiches, ne se trouve pas."

"Mais la difficulté consiste à savoir, si lorsqu'il y a lieu à l'indemnité, l'adjudicataire doit se pourvoir sur le prix de son adjudication, ou s'il doit avoir re-

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cours contre le poursuivant. L'auteur distingue entre le prix de la diminution, pour lequel il renvoie l'adjudicataire sur les deniers par lui consignés, et les frais qu'il a été obligé de faire pour établir le défaut de mesure ou de quantité, pour raison desquels il le renvoie contre le poursuivant, ou contre les opposants qui ont formé la contestation.

"Mais dans l'un et dans l'autre cas, je crois que l'adjudicataire est bien fondé à se pourvoir sur le prix de son acquisition, quand il ne serait pas encore distribué aux créanciers; et si le prix est consumé, il est bien fondé à revenir pour le tout contre le poursuivant."

Idem, p. 552. "Nouvelles observations.

"Dans ma première observation, j'ai parlé de la garantie de l'adjudicataire, quand il y a défaut de mesures; mais je n'ai pas parlé du cas de l'éviction.

"A l'égard du poursuivant, il faut distinguer si l'éviction arrive par quelques défauts de formalités, il en est tenu."

TRONÇON. Coutume de Paris, p. 776.

"Si un adjudicataire par décret d'un héritage saisi et mis en criées, est évincé de son adjudication, les parties remises en tel état qu'elles étaient auparavant, ayant payé et consigné le prix actuellement, pour en être remboursé, peut demander, tant avec le saisi qu'avec les créanciers opposants qui ont été mis en ordre et remboursés sur le prix de la nouvelle adjudication. En un tel cas, qui arrive souvent, le plus sûr est de faire condamner les opposants de rapporter le prix qu'ils ont touché, pour être rendu à l'adjudicataire, lequel outre ce que nous venons de dire, peut faire condamner le poursuivant en criées, à lui restituer ce qui aura tourné en frais de justice et d'ordre, et ce qui défendra du prix, et en tous ses dépens dommages et intérêts."

LACHAIZE, Expropriation forcée, T. 1er, p. 230, No. 215.

"Quand la loi a obligé le poursuivant de faire insérer dans le procès-verbal de saisie immobilière la contenance au moins approximative de chaque pièce saisie, elle a eu un but; c'est de faire connaître d'une manière à peu près exacte la valeur des objets saisis, parce que cette valeur se calcule nécessairement sur l'étendue dont se composent ces objets."

DUYERGIER, T. 1er, p. 361, No. 300.

Idem, T. 1er, p. 418, No. 347: "En admettant l'action en garantie contre le saisi, j'ai indiqué les motifs qui ne permettent pas de l'exercer contre le poursuivant: le saisi est un vendeur, ou du moins il doit lui être assimilé; la position du poursuivant repousse au contraire l'assimilation. Toutefois, si l'action en garantie qui naît de la vente ne peut être intentée contre le créancier qui, pour obtenir son paiement, a poursuivi l'expropriation de son débiteur; ce créancier reste seul la responsabilité de sa faute s'il a compris dans la saisie quelques portions de biens qui n'appartenaient pas à son débiteur; lorsque cette erreur ne peut être attribuée qu'à sa légèreté ou à sa négligence, et qu'il n'a point de justification dans des actes par lesquels le saisi se serait fait considérer comme propriétaire. (Voir les arrêts cités dans la note (2) p. 418, confirmant cette opinion.)

Idem, p. 419, No. 348. "On sait que l'obligation de garantie produit non-seulement une action, mais aussi une exception.

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"L'exception peut-être opposée à tout demandeur en revendication, qui est en même temps successeur, à titre universel, du vendeur; ce qui comprend l'héritier légitime, le légataire universel, et le légataire à titre universel, par la raison qu'ils sont tenus personnellement des engagements de leur auteur." *

IDEM, p. 426, No. 354, *in fine*. "En termes généraux, lorsque celui qui a le droit de revendiquer, est en même temps tenu de l'obligation de garantir, le droit et l'obligation s'annulent réciproquement."

Les prétentions de l'Intimé étaient exposées, comme suit, dans son *factum*.

This Appeal is from a Judgment dismissing Appellant's opposition in the Court below, in the District of Bedford, and has evidently originated in a misunderstanding of the meaning of certain forms of expression, influenced, probably, by the want of accuracy in the use of words in drawing the Deed upon which Appellant's opposition is founded.

It is proved, as well by the authentic deeds filed by Respondent—Papers Nos. 12 and 13 of the Record, as by the witnesses examined by the Appellant, that John Greene and Lucy Bissel his wife, were, so far as the parties here are concerned, the original owners *par indivis* of the south half of the tract of land spoken of in this case as Lots Nos. 17 and 18 of the first range of the Seigniority of Foucault or Allard's Manor.

It also appears by said authentic deeds, Nos. 12 and 13, that on the 12th March, 1856, said Greene and wife sold and transferred said south half of said tract, to wit: one equal undivided half of said south half to Jacob Young the third, mentioned in said Deed No. 12, and the other equal undivided half thereof to Lucy Adela Reynolds his wife, mentioned in said Deed No. 13; and thus said Young and his said wife became proprietors *par indivis* of the whole of said south half of said two Lots Nos. 17 and 18, giving by said deeds to said Greene and wife an hypothec upon their said respective undivided halves, for the balance of the purchase money.

That said Greene, having been named tutor to the minor children of himself and his wife, after her death, as per Paper No. 14 of the Record, he afterwards, on the 20th January, 1858, by authentic deed of transfer, No. 15, assigned to the Respondent the balance due him, upon said sales, by Young and his wife, and that she, Lucy Adela Reynolds, having failed to pay the instalments so assigned as against her to the Respondent, the latter sued her in the Circuit Court for the District of Bedford, upon said assignment. And having recovered judgment against her, on the 8th July, 1859, sued out his writ of Execution against her "lands and tenements," and in virtue of which, David Brown, Sheriff of said District "did seize and take in execution as belonging to her" the equal undivided half of the south half of a certain tract of land known as Lots Nos. 17 and 18 of the first range of Foucault or Allard's Manor, as stated in Paper No. 4, to wit: the Sheriff's deed on which Appellant founds his opposition, and bounded as therein specified, and evidently the same undivided half of the said south half, by her purchased from said Greene. And having advertised, as stated in said deed No. 4, said Sheriff on the 14th December, 1859, at the Parish of St. Thomas in said District, sold under said Writ to the late Pierre Doutre then of Montreal, Advocate, the said undivided half of the

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south half of said tract of land, composed said whole tract of Lots Nos. 17 and 18, for the price stated in said Sheriff's deed—Opposant's Exhibit No. 1 filed in this cause. That is, Lucy Adela Reynolds' *undivided half* of the south half of said Lots 17 and 18 which she owned and held *par indivis* with her husband Young, was sold to Pierre Doutre in satisfaction of Respondent's judgment against her, recovered as aforesaid. And that her *undivided half, only*, of said south half of said two lots was taken in execution and sold as aforesaid to said Pierre Doutre, appears, not only by said Sheriff's declaration in said deed as to what he seized on said judgment, but also by Opposant's opposition itself, in which it is expressly stated that said Sheriff, under said writ, took in execution only "the *equal undivided half of the south half* of a certain tract of land known as Lots Nos. 17 and 18 of the first range above described." And it is not pretended by the Opposant that said Sheriff conveyed to said Doutre, in virtue of said Execution, more land than he seized and advertised for sale under said writ. Nor could the said Pierre Doutre, nor the Appellant *es qual.*, claim by the opposition in question, more than was seized in execution under said writ; yet it is definitely stated by the Sheriff that he took in execution *only the undivided half of the south half*, to wit: the undivided quarter of the said Lots Nos. 17 and 18; nor can the Opposant pretend that he acquired more, under said Sheriff's sale, than an undivided quarter of the said two lots, to be taken out of the south half thereof by subsequent partition or division between him and the said Jacob Young, or whoever might become the owner of said Young's undivided half of said south half, purchased as aforesaid from said Greene by him. How much land the said P. Doutre sold to David Clarke, or that he was obliged to institute an action to rescind the sale, as stated in said opposition, has, it is respectfully submitted, nothing to do with the question now before the Court; nor is the Respondent in anywise bound by such "*res inter alios acta*," nor has he anything to do with the matters referred to in Opposant's special answers, nor the opinions of said Sheriff therein referred to, in the matter of "Ira Taylor vs. Jacob Young, the third," this being also *res inter alios, &c.*, and wholly foreign to the issue in this case.

The simple question in this Appeal is, what land, or rather what *right* in or to land did the late Pierre Doutre acquire under the Sheriff's deed, Paper No. 4 of the Record? Did he acquire a "*corps certain*?" Any exact number of acres? Any distinct separate and specified piece of land, or only the *equal undivided half of the south half* of the said tract of land known as lots Nos. 17 and 18 aforesaid? The Sheriff could legally sell only what he seized under the said Writ against the said Lucy Adela Reynolds, and it is expressly stated in said opposition, as well as in said Deed to the said Pierre Doutre, that the Sheriff took in execution *only the equal undivided half of the south half, &c.*, as above stated, that is, the property acquired by her from said Greene, nor could he sell more than he so seized, whatever ambiguity may exist in the phraseology of the said Deed to Pierre Doutre.

From the survey of Lindal Corey, of Record, mutually named by the parties, and which determines the contents of the said *two* lots, Nos. 17 and 18 to be only 104 acres, it is evident that the undivided half of the south half thereof

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could not possibly contain 49 acres, $\frac{1}{2}$ rod and 12 perches, as erroneously stated by way of *description* in said deed to Doutre; and that Opposant has been misled in this case by a grammatical error in referring the *contents*, as stated in said deed to the undivided half of the south half sold to said Doutre instead of to the *whole* south half of said two lots, is obvious. Respondent submits that Opposant is bound by the material allegations of his opposition, as well as the evident intention of all interested, and that the Sheriff seized and sold to said Doutre only, Lucy Adela Reynolds' rights in said south half of said two lots, to wit: the *equal undivided half of the south half* thereof by her purchased from said Greene as aforesaid, and that her husband, Jacob Young, third, remained the owner of the other undivided half of said south half, which he afterwards sold to John B. Reynolds, the Defendant, without having paid up his said instalments, and that the Respondent, under the transfer to him by John Greene above referred to of said instalments, sued John B. Reynolds, as *Tiers détenteur* of said Jacob Young's said equal undivided half of the south half of said tract of land Nos 17 and 18, and said latter undivided half is now under the seizure opposed in this cause.

Respondent submits that it is plain from the wording of the Sheriff's deed, relied upon by Opposant, as well as from the allegations of his opposition founded thereon, that the late Pierre Doutre acquired only, and could acquire under the seizure from which he derives title only, "the equal undivided half of the south half" of said lots, be the contents of his acquisition what they may.

That from the contents—104 acres, of the whole of said two Lots, as established by said Mr. Corey, Provincial Land Surveyor, it is impossible that the interest in the south half thereof, taken under the execution from which Opposant claims title, could be of the extent of 49 acres, $\frac{1}{2}$ rod and 22 perches. The contents are mentioned as referring to the whole, and not to the *half* of said south half are vaguely *descriptive only*. If Appellant's pretensions were correct, then Jacob Young's undivided south half, acquired from Greene as above, was sold under an execution against Lucy Adela Reynolds, and that too without giving Young any notice of opportunity of saving his property by opposition, the advertisement of the sale having been evidently from the wording of the Sheriff's deed to Pierre Doutre of "*the equal undivided half of the south half, &c., of the lands and tenements of Lucy Adela Reynolds.*"

The property taken under the execution from which the Opposant claims title, is definitely specified, and the allegations that it consists of so many acres, *more or less*, is no reason for despoiling the neighbouring proprietor, whatever claim it may give the purchaser to a reduction in price in case of deficiency in area.

BERTHELOT, J.A.—Par acte de vente du 13 Mars, 1856, Tremblay, Notaire, en la paroisse de St. Thomas, John Greene et sa femme Lucy Bissell ont vendu à Jacob Young the Third, "the equal undivided half of the south half of a certain tract of land known as Nos. 17 and 18 of 1st range of Foucault or Allard's "Manner bounded the whole of said tract, to the south, by lot No. 16, to the north by lot No. 19, towards the west by the River Richelieu and towards the east by lot No. 38, in the second range and by other lots in said second con-

"cession, containing said undivided half of said south half of said lots, 40 acres, half a rod and 12 perches in superficies, more or less, with also all the buildings erected on said undivided pieces or parcels of land and premises."

Par acte du même jour Greene et sa femme, ont vendu à Lucy Adela Reynolds femme du dit Jacob Young the Third, l'autre moitié indivise de la moitié sud du dit morceau de terre connu sous Nos. 17 et 18, et entièrement désignée de la même manière.

Il est évident d'après ces deux actes passés le même jour, devant le même notaire, que Jacob Young the Third, le mari et Lucy Adela Reynolds, sa femme, n'ont acquis chacun que la moitié indivise de la moitié sud des lots 17 et 18 au 1er rang de Foucault c. à d. $\frac{1}{4}$ du total.

Greene tant en son nom que comme tuteur aux enfants nés de son mariage avec sa femme Bissell a transporté par acte devant Belle, notaire, du 20 Janvier 1858, à W. Elvidge, l'intimé, \$750, dus comme balance sur chacun des deux prix de ventes du 12 Mars 1856 faites au dit Young the Third et à la dite Adela Reynolds et dus par chacun d'eux séparément.

Le 14 Décembre 1859, feu Pierre Doutre, représenté aujourd'hui par l'Appelant, est devenu adjudicataire à la vente par décret qui en fut faite ce jour là, à la porte de l'église St. Thomas par le Shérif du District de Bedford, en vertu d'un writ d'exécution à la poursuite de l'intimé Elvidge, contre "*the lands and tenements*" of Lucy Adela Reynolds "*wife of Jacob Young the Third,*" d'un immeuble désigné dans le titre du dit Shérif au dit Pierre Doutre, comme suit :

"The equal undivided half of the south half of a certain tract of land known as lots Nos. 17 and 18 of the first range of Foucault or Allard's Mannor bounded the whole of the said tract as follows; towards the north by lot No. 19, to the south by lot No. 16, towards the west by the River Richelieu, and towards the east by lot No. 38 in the second concession, and by other lots in the said second concession, containing said undivided half of said south half of said lots, 40 acres, half a rod and 12 perches in superficies, more or less, with also all the buildings that may stand erected on said undivided piece or parcel of land and premises."

Mr. P. Doutre n'a pu acquérir au décret que la même quantité de terrain que celle qui était en la possession de la femme Adela Reynolds sur qui le décret avait lieu; or cette quantité était la moitié indivise de la moitié sud des lots Nos. 17 et 18 au 1er rang de Foucault, ainsi qu'il a été mentionné ci-dessus.

Il est bien vrai qu'il est dit dans la désignation "*containing said undivided halves of said south half of said lots 40 acres, half a rod and 12 perches*" mais cette expression quant à la contenance ne peut être prise comme une garantie que ce qui était vendu contenait 40 acres, parce que la vente n'était pas faite à la mesure ou à la quantité, mais bien seulement d'une certaine portion des lots Nos. 17 et 18 c'est-à-dire de la moitié indivise de la moitié sud des dits lots rien de plus. J'avoue que la désignation est assez vicieuse, et qu'elle a pu faire tomber l'adjudicataire en erreur sur la quantité qui lui était adjugée, mais il ne peut y être remédié par la procédure que l'Appelant a adoptée, et c'est bien malheureux pour lui sans doute.

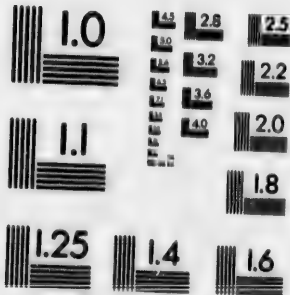
C'est en vain que l'Opposant (l'Appelant) prétend qu'il a droit de se pourvoir contre le Demandeur actuel pour l'insuffisance de ce qui lui a été livré par suite

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du décret du 14 de Décembre 1859. C'était à lui à voir ce qu'il achetait et ce qu'il pouvait acheter, ou ce qui pouvait être vendu par un décret fait sur la femme Reynolds, qui ne pouvait être expropriée que de ce dont elle était devenue la propriétaire par l'acte du 12 Mars, 1856.

Si sa prétention de dire qu'il a acheté 49 arpents est bien fondée, il aurait dû se pourvoir par opposition sur les deniers pour demander la diminution de son prix d'adjudication proportionnellement à raison de ce qui ne pouvait lui être livré; * ou encore il pouvait se pourvoir contre ceux à qui les deniers ont été accordés par le jugement de distribution.

Il n'a eu recours à aucun de ces moyens qui paraissent les seuls qu'il avait et qu'il a peut-être encore, si toutefois il peut établir que la désignation de ce qu'il a acheté comportait une garantie de contenance, ce que je ne crois pas.

L'erreur par suite de la quelle l'Opposant souffre, remonte à la désignation donnée lors de la vente du 12 Mars 1858, mais je ne puis aucunement voir, comment il peut y remédier en vertu de son opposition afin de distraire, par laquelle il prétend qu'en vertu de la vente par décret du 14 Décembre, 1859, il a droit de réclamer comme adjudicataire l'autre moitié indivise de la dite moitié sud des dit lots 17 et 18; laquelle moitié est maintenant sous saisie sur le nommé Reynolds, propriétaire de cette dite autre moitié indivise qui avait été vendue le 12 Mars 1856, au dit Jacob Young *the Third*, le mari de la dite Adela Reynolds sur la quelle la vente par décret du 14 Décembre a eu lieu.

Selon ce qui a été décidé par cette Cour, le 31 Mai 1860, dans la cause de Desjardins contre La Banque du Peuple, dont il y a rapport au 10e Vol. de la Revue des Tribunaux, p. 325, aussi bien qu'au jugement rendu par cette Cour le 16 Mars 1863, dans la cause de Brown et Jackson, l'Opposant ne peut réussir sur la présente opposition.

Le jugement dans la première de ces causes a consacré le principe qu'un adjudicataire en pareil cas devait se pourvoir par action contre ceux qui ont touché les deniers, et c'est ce que l'Opposant aurait dû faire, si ayant réellement acheté la moitié des lots 17 et 18, il n'a pu se faire livrer qu'un quart d'iceux.

Selon ce qui a été décidé dans la seconde cause, où il s'agissait aussi d'une erreur dans la désignation, on peut lui dire que la description donnée ne comporte pas la vente de la moitié des dits lots, mais bien seulement du quart d'iceux, étant ce qui avait été acheté et appartenait à la dite Adela Reynolds, et qu'il y avait eu erreur évidente dans la dernière partie de la désignation.

Et l'Appelant serait donc sans autre recours que celui qui peut lui résulter de l'erreur dans laquelle il est tombé par suite d'une désignation vicieuse. Mais ce n'est pas par une Opposition afin de distraire qu'il pouvait se pourvoir.

Je ne vois pas que les autorités de l'Appelant justifient la procédure qu'il a adoptée, et il faut toujours en revenir à considérer la question comme je l'ai ci-dessus exprimée.

Le jugement devra donc être confirmé pour les motifs qui se trouvent dans le jugement de cette cour, le jugement de la Cour Supérieure que nous confirmons n'en contenant aucun.

* 3 Rev. de Leg. p. 476, The sale of an estate, by decret, for more in quantity than it contains, entitles the purchaser to a diminution of the price, but does not annul the same Gray vs. Todd and Usborne.

MONDELET, J.—Je ne vois aucune difficulté dans cette cause.

Quelqu'ait été l'erreur de la désignation quant au nombre d'arpens, lors du décret, il est parfaitement évident que Pierre Doutre n'a acquis et ne pouvait acquérir que "the equal undivided half of the south half of a certain tract of land known as lots numbered seventeen and eighteen of the first range of Foucault or Allard's Mannor." Ainsi, qu'il fut dit ou non que cette moitié avait "49 acres, half a rod and 12 perches in superficies" et cela s'y trouve, il ne pouvait toujours y avoir que ce que l'arpenteur a constaté être, savoir : 104 arpens formant les deux lots, 49 arpens, $\frac{1}{2}$ rod et 22 perches pour moitié, et tout au plus 24 arpens et quelque chose en sus pour la part de Doutre, puisque c'est la moitié indivise de la moitié sud des lots 17 et 18. Le Shérif n'a pu, par une erreur, faire que ce qui n'a que 24 arpens en ait 49, et Doutre en devenant l'acquéreur de la moitié de la moitié des 104 arpens, n'a pas pu acquérir 49 ! Non, la chose est évidente, Doutre n'a acquis que ce qui réellement était saisi et vendu par décret.

Cette Cour ne peut non plus effectuer une impossibilité, et encore moins affirmer une fausseté, ce qui serait le cas, si elle décidait dans le sens de l'Opposant, l'Appelant, qu'elle ne peut, sans blesser la vérité, déclarer être le propriétaire d'une étendue de 49 arpents; c'est hors de question.

Il n'appartient pas à cette Cour, d'indiquer à l'Opposant qui d'ailleurs peut le faire sans secours étranger, la marche qu'il doit suivre pour se faire rendre justice, mais elle doit déclarer, que dans l'instance telle qu'elle se présente ici, elle ne peut aucunement agir dans le sens de l'Opposition.

Le principe consacré par cette Cour, dans la cause de Desjardins vs. La Banque du Peuple, quant à la garantie du décret par le Demandeur, ne peut en rien aider l'Opposant ici; la question n'est pas la même.

Le jugement de la Cour de première instance (lequel n'est pas motivé) doit être confirmé.

Il me semble qu'il eût été convenable que la Cour de première instance assignât quelque motif pour faire connaître le principe qui servait de base à son jugement. Je pense que la Cour d'appel doit motiver son jugement et elle le fait.

"La Cour, * * * Considérant que par la vente par décret du 12 Décembre 1859, qui a eu lieu sur la nommée Lucy Adela Reynolds par le Shérif du District de Bedford, feu Pierre Doutre, représenté par l'Opposant es qualité, n'a pu devenir acquéreur et adjudicataire que de ce dont la dite Lucy Adela Reynolds était alors propriétaire, en possession, c'est-à-dire de la moitié indivise de la moitié sud des lots numéros 17 et 18 au premier rang de Foucault ou "Allard's Mannor" et qu'elle avait acquise par acte de vente du 12 Mars 1850, reçu devant Mtre. Tremblay, et son confrère, Notaires, du nommé John Greene et de son épouse, laquelle dite moitié indivise est du quart du total des dits biens, et rien de plus.

Considérant que pour ces raisons, il n'y a pas d'erreur dans le jugement rendu par la Cour Supérieure pour le District de Bedford siégeant à Nelsonville, le 13 Octobre, 1862, a confirmé et confirme le dit jugement avec les dépens devant cette cour."

Appel renvoyé.

Charles Daoust, pour l'Appelant.

Marcus Doherty, pour l'Intimé.

(J.D.)

Doutre,
et
Elvidge.

COUR SUPERIEURE.

MONTREAL, 23 FEVRIER, 1863.

Coram MONK, J. A.

No: 370.

Turcotte.

vs.

Papans et al.

Juge:—Que les arrérages d'une rente constituée pour l'aliénation et le prix d'un immeuble ne sont prescriptibles que par 30 ans;—

2o. Que la vente par décret de cette rente constituée n'a opéré aucune novation de cette rente et n'a pas eu l'effet d'en changer la nature;—

3o. Que les propriétaires par indivis de l'héritage hypothéqué au paiement des arrérages de cette rente qui sont indivisibles; sont tenus solidairement au paiement de ces arrérages.

Les Demandeurs réclamaient des Défendeurs en possession comme propriétaires par indivis d'une terre affectée au paiement d'une rente constituée la somme de £60 pour arrérages de cette rente depuis le 9 Mai 1837, à venir au 9 Mai 1862, et résultant de l'acte de vente consenti par Benjamin Berthelet à Louis Papans père des Défenderesses et ses donataires; le 14 Avril 1836.

Les Defenderesses plaidèrent entr'autres moyens de défense la prescription de cinq ans et firent des offres pour les arrérages des dernières cinq années— et de plus elles prétendirent que la nature de cette vente avait été innovée par le décret qui en avait été fait le 7 Janvier 1842 et que dans tous les cas, par suite de cette novation la prescription de cinq ans s'appliquait à l'encontre des arrérages de cette rente.

MONK, J.—This is an action instituted to recover arrears of *rente constituée*. On the 14th of April, 1836, Benjamin Berthelet, sold a farm to Louis Papans for the sum of £50, whereof £10 was paid down, and for the balance £40, an annual constituted rent of £2. 8s was stipulated to be paid. In the course of the same year, Papans made a donation of this property to his two daughters, then minors, the defendants in this cause. By the deed of donation, passed on the 17th May, 1836, the daughters agreed to pay the constituted rent. In 1840, on circumstances of Berthelet, the original proprietor, became embarrassed, and judgment being obtained against him, the *rente constituée* above-mentioned, on the 7th June, was sold, together with all arrears. At a subsequent period, the purchaser transferred the *rente* to one Desilets, at the same time making over all the arrears due by the minor children. When the minors had attained the age of majority they ratified the deed of donation. The representatives of Desilets now brought the present action for the arrears accrued, stating that the Defendants were still in possession, and had been in possession since the day of ratification. The claim was resisted by the defendants, principally on the ground that the prescription of five years applied to the arrears sought to be recovered, and that the plaintiff's claim could therefore extend only to five year's arrears. The Defendants have adduced the authority of Duranton and several others to prove that a novation had taken place in consequence of the sale of the property. But notwithstanding these authorities, the Court is of opinion that no novation has taken place. It was shown that the property was alienated by a deed of sale, that part was paid down, and the remainder was made *rente con-*

tituée. No doubt therefore exists as to the prescription. The *rente* was established for the price of an immovable and not as a *rente* for the alienation of a *capital*; and the Court has always been of opinion that the prescription of five years did not apply to *rentes* resulting from the alienation of an immovable property, but only to those established for the alienation of a *capital*. The five years, prescription did not, therefore, apply. Pothier, it is true, seemed to differ, but Pothier had doubts, and where this was the case, we might readily have recourse to other authorities, and these authorities went to prove that only the prescription of 30 years would apply in the present case. It had been contended on the part of the defendants that they were entirely ignorant of the nature of the title to the property which had been donated to them, and therefore, so far as they were concerned, the *rente* became an ordinary *rente constituée à prix d'argent*, by the alienation of a capital. But unfortunately for this pretension, particular reference was made to this very point in the deed of donation, and the matter was so explicitly stated, that they were found to be informed that the *rente* was one constituted by the alienation of an immovable, and therefore not subject to the five year's prescription. Again, it was alleged by the defendants that the Sheriff of Montreal sold this property, and thence it was pretended that whatever the original character of the *rente*, it then fell into the class of ordinary *rentes constituées*. But the Court see no reason to believe that any change had been made in the character of the *rente* by the Sheriff's sale, so as to alter the prescription to one of five years. The Court might be disposed to characterize the *rente* as the defendants had characterized it, if it rested upon the three latter deeds only, namely, the deed of donation, the Sheriff's sale, and the transfer; but, in fact, it rested not only upon these, but also upon the particular title by which the rent was constituted. The Court now come to the point as to whether the plaintiff has made out his title. There seemed to be no difficulty about this. But another question arose—Were these Defendants to be considered in possession of the property from the day of donation? They were of very tender age when the donation was made, but having subsequently ratified it on attaining the age of majority, the question must be answered in the affirmative. Lastly, it was said that the action was wrongly brought, inasmuch as it was directed against them jointly and severally. But the Court is of opinion that though it is a personal action, the defendants must be condemned jointly and severally to pay the arrears, inasmuch as they possess the land *par indivis*.

Judgment for £60 of arrears, with interest and costs.

Le jugement de la Cour est motivé comme suit :—

La Cour après avoir entendu les Parties par leurs avocats sur le mérite de cette cause, examiné la procédure, pièces produites et les admissions données par les Défendeurs, et avoir sur le tout délibéré.—Considérant que par l'acte de vente consenti par Berthelet mentionné dans les plaidoyers produits en cette cause à Louis Papans en date du quatorze Avril mil huit cent trente six, une rente constituée de deux louis huit chelins par année sur un capital de quarante louis, courant, fut établie en faveur du dit Benjamin Berthelet le Vendeur.

Considérant que cette rente annuelle était ainsi constituée pour le prix d'un immeuble et non une rente pour l'aliénation d'un capital.

Turcotte,
vs.
Papans et al.

Turcotte,
vs.
Papans et al.

Considérant que cette rente ainsi constituée est régie non pas par des principes qui régissent les rentes établies pour l'aliénation d'un capital, mais par ceux,—qui régissent les rentes résultantes de l'aliénation d'un héritage.

Vu que par la donation faite et consentie par L. Papans de l'immeuble ainsi acheté du dit Benjamin Berthelet à ses deux filles les Défenderesses en cette cause en date du dix sept Mai mil huit cent trente six, la nature et le montant de la dite rente étaient déclarés, et que les Défenderesses agissant de la manière mentionnée dans le dit acte de donation ont accepté la dite donation et qu'elles se sont obligées de payer la dite rente constituée, telle que mentionnée dans le dit acte de vente.

Considérant que par la ratification de la dite donation par les Défenderesses, en date du premier Septembre mil huit cent cinquante sept, les dites Défenderesses doivent être, et sont censées avoir été en possession de la dite terre désignée dans la déclaration, depuis le dix sept Mai mil huit cent trente six, la date de la dite donation consentie en leur faveur par leur père le dit Alexandre Louis Papans.

Considérant que la vente de la dite rente constituée par le Shérif du district de Montréal, le sept Janvier mil huit cent quarante deux, n'a opéré aucune novation de la dite rente ou aucunement changé la nature de la dite rente soit à l'égard des Défenderesses soit à l'égard de l'acheteur de la dite rente.

Considérant qu'il résulte de la preuve produite en cette cause que cette action est basée non-seulement sur l'acte de donation du dix sept mai mil huit cent trente six, la vente par le Shérif du sept Janvier mil huit cent quarante deux et le transport du seize Décembre mil huit cent quarante et un, mais aussi sur l'acte de vente du quatorze Avril mil huit cent trente six.

Considérant de plus que pour les arrérages de rente constituée pour l'aliénation et pour le prix d'un héritage la prescription de cinq ans invoquée et plaidée par les Défendeurs ne s'applique pas d'après nos lois et que la prescription de trente ans seulement s'applique.

Vu que dans les circonstances de cette cause ci-haut constatées, les offres faites par les Défenderesses dans les exceptions en premier lieu plaidées par les Défenderesses ne sont pas suffisantes.

Considérant que les Défenderesses ont accepté la donation à elles faite par le dit Alexandre Louis Papans en date du dix sept Mai, mil huit cent trente six et l'ont ratifiée à leur âge de majorité, se sont par leurs actes légalement faits et consentis, rendues responsables en droit pour le paiement de tous les arrérages réclamés par les Demandeurs.

Considérant qu'elles sont responsables solidairement pour le paiement des dits arrérages, eu autant qu'elles possèdent la dite terre par indivis comme propriétaires d'icelle, et que dans les circonstances de cette cause les arrérages d'icelle qui en résultent sont indivisibles quant aux Défenderesses.

Considérant que partant, les offres faites par les Défenderesses dans leur exception en second lieu plaidée ne sont pas légales ou suffisantes, a débouté et déboute les dites deux exceptions ainsi plaidées par les dites Défenderesses à l'encontre de la présente action; —Procédant à juger sur le mérite de cette cause, considérant que les Demandeurs ont prouvé par une preuve légale et

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suffisante les allégués essentiels de leur déclaration, la Cour maintient l'action et demande des Demandeurs et condamne les Défenderesses conjointement et solidairement à payer aux Demandeurs la somme de soixante louis du cours actuel de la Province du Canada, pour arrérages, calculés depuis le neuf Mai mil huit cent trente sept jusqu'au neuf Mai mil huit cent soixante et deux, de la rente mentionnée dans la dite déclaration, lesquels arrérages sont réclamés par cette action avec intérêt sur la dite somme de soixante louis à compter de ce jour jusqu'au paiement et aux dépens.

Belle, avocats du Demandeur. (1)

Doutre & Daoust, avocats des Défenderesses.

P. R. L.

Turcotte,
vs.
Papans et al.

MONTREAL, 30 MAI, 1863.

Coram MONK, J. A.

No. 803.

Leduc vs. Fortier.

Jugé:—Que par suite d'un jugement de séparation de corps et de biens, sur la contestation des droits et reprises matrimoniales de la femme; elle devra rembourser à son mari ou à ses créanciers le montant des dettes par lui acquittées sur un propre de sa femme et que compensation aura lieu d'autant quant à ses reprises matrimoniales.

Par le rapport du Praticien, il appert que les dettes payées par le mari pour et à l'acquit de sa femme sur et à raison de ses propres dépassaient le montant des reprises de cette dernière, en sorte qu'elle fut tenue à en rendre compte à son mari ou à ses créanciers.

Le jugement est motivé comme suit:—

La cour après avoir entendu la Demanderesse par ses avocats sur sa motion du vingt-sept de mai courant, et sur le Rapport de Mtre. J. A. Labadie, Notaire, praticien nommé par Jugement Interlocutoire rendu en cette cause le dix-sept avril mil huit cent soixante et trois, pour déterminer les droits et reprises de la dite Demanderesse séparée quant aux biens du Défendeur, Joseph Fortier, son mari, par jugement de cette Cour rendu le trente et un de mars mil huit cent soixante et trois, le Défendeur n'ayant pas comparu lors de la dite audition, avoir examiné le dit Rapport et les pièces produites au soutien d'icelui, et nommément le contrat de mariage des parties en cette cause passé devant Mtre. C. D. Decelles, et son confrère Notaires, le quatorze de novembre mil huit cent cinquante et un; vu la renonciation faite par la Demanderesse à la communauté de biens qui a existé entre elle et le dit Défendeur son mari et vu le dit jugement du trente et un de mars dernier, et avoir sur le tout délibéré, accorde la dite motion, et a homologué le dit Rapport pour être suivi et exécuté suivant sa forme et teneur, et réservant à la Demanderesse ses douaire et préciput mentionnés au dit Rapport quand il y aura lieu; Déclare les droits, reprises et conventions matrimoniaux de la dit Demanderesse consister en ce qui suit: 1° en une terre, 2° en un emplacement, 3° en la somme de £50 0 2 cours actuel de cette Province montant de l'estimation des meubles et effets mobiliers contenus

(1.) Cette cause est actuellement pendante en appel.

Leduc,
vs.
Fortier.

et énumérés en l'Inventaire mentionné au dit Rapport, les dits meubles et effets mobiliers donnés par Dame Marie Martin dite Ladouceur au dit Joseph Fortier son gendre par l'acte de donation cité au dit Rapport;

4^o En la somme de seize louis dix-neuf chelins et sept deniers du dit cours montant des créances actives aussi contenues au dit Inventaire et données par la dite Dame Marie Martin dite Ladouceur au dit Joseph Fortier son gendre par le même acte de donation.

Ces deux sommes réunies forment celle de soixante-six livres dix-neuf chelins et neuf deniers du dit cours, mais cette dernière somme compensée avec celle de quatre-vingt-dix livres, trois chelins et trois deniers du dit cours que le Défendeur a payé en l'acquit de la dite Dame Marie Martin dite Ladouceur pour le montant des dettes passives et des frais funéraires portés au dit Inventaire, aussi en considération du dit acte de Donation; laisse une balance en faveur du dit Défendeur de la somme de £23 3 6 du dit cours que la dite Demanderesse devra rembourser et tenir compte au dit Défendeur ou à ses créanciers, ci £23 3 6.

Plus, la dite Demanderesse devra rembourser et tenir compte au dit Défendeur son mari, ou à ses créanciers, d'une autre somme de douze mille livres ancien cours égale à cinq cents livres cours actuel, que le dit Défendeur a payé en l'acquit de la dite Dame Marie Martin dite Ladouceur, savoir: quatre mille livres dit ancien cours à Joseph Lecavalier et Marie Louise Leduc son épouse; quatre mille livres même cours à Jean Baptiste St. Germain et Mathilde Leduc son épouse et quatre mille livres même cours à Pierre Falèse Leduc aux termes du dit acte de Donation.

Donation..... £500 0 0

Total à rembourser..... £523 3 6

Plus la Demanderesse devra remplir et exécuter à l'avenir envers Dame Marie Martin dite Ladouceur sa mère, pendant sa vie durant; toute et chacune les charges et obligations auxquelles le dit Défendeur pourrait être tenu envers elle par le dit acte de Donation.

..... Et la Cour condamne le Défendeur Joseph Fortier aux dépens de cette action.

Drummond & Bélanger, Avocats de la Demanderesse.

Leblanc & Cassidy, Avocats du Défendeur.

(P.R.L.)

MONTREAL, 29 SEPTEMBRE, 1863.

Coram MONK, J. A.

No. 1298.

Limoges, vs. Marsant & Labelle, opposant.

JUGE:—Que le créancier qui a un droit hypothécaire antérieur aux charges réservées dans la saisie d'un immeuble, peut par opposition *et* d'annuler obtenir la radiation de ces charges.

La Demanderesse, Dame Marie Louise Limoges, poursuivant l'exécution d'un jugement en séparation de biens, avait fait saisir un immeuble du Défendeur, son mari, sujet à une rente viagère créée par acte de donation enregistré le 19 Mars, 1862, en faveur de la mère de ce dernier, Dame Josephite Hubert dite Dutrisac

et à un certain chemin macadamisé en faveur de la Compagnie des chemins de Péage de l'Isle Jesus, que le Défendeur avait vendu à Fabien Vinet et autres personnellement par acte de vente non enregistré?

L'opposant Frs. Labelle, porteur d'une obligation de £200 enregistrée contre le Défendeur le 12 Juillet, 1860, et par conséquent avant les titres* créant ces charges, produisit une opposition afin d'annuler à la saisie quant aux dites charges, demandant que l'immeuble soit vendu pur et net des dites charges, à moins qu'il lui soit donné caution de sa créance.

L'opposition ayant été rapportée par le Shérif, l'opposant mit en cause les parties intéressées aux dites charges, qui toutes ainsi que la Demanderesse déclarèrent n'avoir aucune contestation à faire. Le Défendeur seul contesta, mais finit par admettre la vérité des faits de l'opposition. Voici le jugement qui est intervenu dans cette espèce :

" La cour après avoir entendu l'opposant et le dit Défendeur contestant par leurs avocats respectifs et la dite Demanderesse et les mis en cause, comme ayant déclaré n'avoir aucune contestation à faire à l'opposition afin d'annuler faite en cette cause par le dit opposant, examiné la procédure et plus particulièrement la réinscription pour audition finale au mérite le vingt-quatre du mois de Septembre courant du consentement de toutes les parties et l'admission du dit contestant reconnaissant comme vrais tous les faits allégués dans l'opposition, pièces produites et sur le tout délibéré. Considérant que l'immeuble saisi en cette cause à la poursuite de la Demanderesse contre le Défendeur en vertu du bref *alias fieri facias de terris*, émané en cette cour le premier jour de Décembre dernier par le Shérif pour le dit district de Montréal, a été saisi et annoncé pour être vendu et adjugé, sujet à et grevé de certaines charges et redevances en faveur des dits mis en cause.

" Considérant que le dit opposant a sur le dit immeuble un droit hypothécaire antérieur aux dites charges ; et plus particulièrement que le titre en vertu duquel la dite hypothèque en faveur du dit opposant, existe, savoir, l'acte d'obligation et hypothèque contre le dit immeuble, consenti en la paroisse de Ste. Rose, le onzième jour du mois de juillet mil huit cent soixante, devant Maître F. X. Léonard et confrère, notaires, par le dit Défendeur en faveur de l'opposant, pour la somme de deux cent louis courant, a été enregistré le douzième jour de juillet, mil huit cent soixante, et avant l'acte de donation consenti par feu Antoine Marsant dit Lapierre et la dite Dame Marie Josephite Hubert dite Dutrisac, en faveur du Défendeur en cette cause, le vingt-quatrième jour de Septembre, mil huit cent quarante et un devant Mtro M. Charest, et confrère, notaires, et créant en faveur de la dite Dame Marie Josephite Hubert dite Dutrisac, les charges mentionnées en premier lieu en la dite saisie et au dit avis de vente, de livrer, fournir et faire valoir chaque année au profit et la vie durant, à commencer du premier de mai dernier, de la dite Dame Marie Josephite Hubert dite Dutrisac, une rente et pension viagère, composée des effets et articles détaillés en la dite saisie et le dit avis de vente, lequel acte de donation n'a été enregistré que le dix-neuvième jour de Mars mil huit cent soixante et deux, et considérant en outre que les charges en second lieu mentionnées dans la dite saisie et le dit avis de vente sont réservées en faveur

Limoges,
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Labellie.

" de la compagnie des chemins de Péage de l'Isle Jesus, corps politique et incorporé, et que l'acte de vente d'une certaine partie du dit terrain fait et passé le vingt-cinq novembre, mil huit cent soixante et un, devant Maître F. X. Léonard et confrère, notaires, par le dit Défendeur à Monseigneur Jacques Janvier Vinet, Fabien Vinet, Alexandre Maurice Delisle, et Benjamin Henri Lemoine, personnellement dans le but d'en faire un chemin macadamisé, ne pouvait conférer ni donner aucun pouvoir ni droit quelconque à la dite compagnie des chemins de Péage de l'Isle Jésus, qui lors de la passation du dit acte de vente, n'existait pas encore, n'ayant en effet été incorporée que le neuvième jour de juin mil huit cent soixante et deux, par l'acte vingt-cinq, Victoria, chapitre soixante et dix sept; et considérant d'ailleurs que le dit acte de vente n'a jamais été enregistré au Bureau d'enregistrement du dit comté de Laval.

" Considérant enfin que le dit opposant a droit d'être payé de sa créance hypothécaire, avant que la dite Dame Marie Josephte Hubert dite Dutrisac puisse réclamer sur le dit immeuble saisi en cette cause la rente et pension viagère et autres charges mentionnées en sa faveur dans la dite saisie, et aussi avant que les dits Monseigneur Vinet et autres, puissent réclamer aucun droit de propriété sur aucune partie du dit immeuble, à moins qu'il lui soit donné bonne et valable caution pour sûreté de sa dite créance, et que ni la dite Demanderesse ni les autres parties mises en cause et intéressées aux dites charges n'ont pas donné au dit opposant telle caution, et qu'ainsi le dit opposant se trouve lésé dans ses garanties hypothécaires pour la dite saisie.

" Annule, casse et met au néant la dite saisie quant aux dites charges et à chacune d'icelles, décrites et spécifiées comme suit dans la dite saisie et avis de vente (*ci-suit la description des charges*); et ordonne que dans les quinze jours de la signification du présent jugement sur la dite Demanderesse et à sa poursuite, et à son défaut à celle de l'opposant, il soit suivant le cours régulier de la loi, procédé à la vente de tout le dit immeuble décrit comme suit en la dite saisie et le dit avis de vente (*ci-suit la description de la propriété*); purement et simplement et clair et net des dites charges plus haut décrites et spécifiées et de chacune d'icelles, en la même manière, que si les dites charges n'étaient pas mentionnées en la dite saisie et au dit avis de vente, et en outre le dit Défendeur contestant est condamné à tous les dépens de la présente opposition dont distraction est accordée à Mr. Désiré Girouard, avocat du dit opposant."

Loranger & Frères, avocats de la Demanderesse et de Monseigneur Vinet, Fabien Vinet, A. M. Delisle & B. H. Lemoine.

R. & G. Laflamme, avocats de Dame Hubert dite Dutrisac.

Morin & Marchand, avocats du Défendeur.

D. Girouard, avocat de l'opposant.

(D. G.)

DISTRICT D'ARTHABASKA.

COUR SUPERIEURE, 19 JUIN, 1862.

Coram STUART, J.

Pacaud vs. Dubé, et les Syndics, &c.,

Opposants.

Jugé;—Les frais de vente d'immeubles par le Shérif ne sont pas répartis également sur chaque immeuble, mais au *pro rata* du prix de vente.

Tout opposant peut forcer un adjudicataire à déposer le prix de son adjudication quand bien même cet opposant n'aurait aucun droit sur ces argents.

Les frais de distribution d'argent provenant de la vente d'immeubles sont payés au *pro rata* des sommes pour lesquelles les immeubles ont été vendus.

Le Demandeur en cette cause fit vendre, par le Shérif, sur le Défendeur, deux terres: la première pour £40, dont il se porta adjudicataire; la seconde fut adjugée à Ant. Gagnon, Ecr., pour £10.

Le Demandeur paya au Shérif la juste moitié des frais d'adjudication et garda la balance par devers lui, qui lui était due, et qui devait lui être payée avec *privilege de Bailleur de fonds*. Mr. Gagnon, l'adjudicataire de l'autre terre paya au Shérif £10, le montant de son adjudication.

Les Syndics de la paroisse de St. Norbert d'Arthabaska produisirent une opposition afin de conserver, par laquelle ils réclamaient par privilège avant tout autre créancier £2 10 10 pour le montant de la répartition que la terre vendue pour £10; devait pour la construction de l'église et sacristie de la paroisse de St. Norbert d'Arthabaska.

Le Prothonotaire prepara un projet de distribution des argents.

Les frais du Shérif.....	£11	18	0½
Préparation du projet, ...	1	2	6
Procédés	0	10	0
Frais privilégiés.....	6	5	0
Frais d'homologation.....	2	10	0

Montant à..... £22 8 0½

Furent divisés en cinq parts de £4 9 3 chacune. Ainsi, G. J. Pacaud, fut reparti à £17 16 9, et les Syndics à £4 6 3.

Sur les £40, prix d'adjudication du No. 1, fut déduit £17 16 9 pour les frais et £0 10 0 pour la Collocation, laissant une balance de £21 13 3 à être payés au créancier par privilège de Bailleur de fonds sur la terre No. 1.

Sur les £10 provenant de la vente de la terre No. 1, il fut d'abord déduit £4 9 3 pour la proportion des frais, laissant une balance de £5 18 9, qui fut répartie comme suit:

Collocation	£0	1	0
Opposition.....	2	6	8
Aux Syndics	2	10	10

£5 5 10

Pacaud,
vs.
Dubé.

L'adjudicataire de la terre No. 1, refusa de déposer la balance qu'il redevait sur le prix de son adjudication pour deux raisons; la première, parceque cette balance lui appartenait en préférence à tout autre créancier et que par conséquent personne n'avait intérêt à ce-que cette somme fut rapportée en Cour; la seconde, c'est que s'il rapportait, en Cour, cette somme d'argent, on la prendrait pour faire un jugement de distribution dont il aurait la façon à payer en pure perte pour lui et qui ne profiterait qu'aux opposants dont il n'était nullement obligé de servir les intérêts. Il contesta de plus le projet de distribution qui selon lui devait être mis de côté :

10. Parceque les frais de vente par le Shérif devaient être supportés par chaque immeuble par part égale, car la vente de chaque immeuble avait coûté les mêmes frais.

20. Par ce qu'il n'avait pas besoin d'un jugement de distribution, si les opposants en voulait un, qu'ils eussent à en payer le prix.

L'adjudicataire, disait; les opposants en cette cause ne peuvent obtenir leur motion pour *folle enchère* contre moi; j'ai payé aux officiers de justice ma juste moitié des frais de la vente en cette cause qui doivent être supportés par chaque terre également, puisque les frais de la vente de chaque terre ont été égaux. Les opposants veulent me faire déposer l'argent afin qu'ils s'en servent pour faire un jugement de distribution, dont ils ont seuls besoin. Leurs droits ne sont pas établis comme les miens qui apparaissent par le certificat du Registrateur que je produis à mes frais pour prouver ma créance et mon privilège. Les opposants ont été obligés de faire une opposition pour constater leurs droits. Si leur position exige des frais et des dépenses, dois-je les supporter à mon détriment pour servir leurs intérêts? Sur quelle loi se fonde-t-on pour m'obliger à dépenser mon argent au profit d'autrui? S'il en était ainsi, la compagnie des plaideurs dans les Cours de Justice, deviendrait suspecte et dangereuse comme celle dont les honnêtes gens sont les victimes dans les lieux suspects et mal-famés.

S'il faut absolument un jugement de distribution, qu'il soit fait aux dépens de la partie qui le sollicite et qui en a un besoin indispensable. Au reste si tous les plaideurs doivent être punis pour avoir demander justice aux Tribunaux, que le châtement soit réparti également entre les parties intéressées; que les frais de distribution soient divisés également entre les parties, puisque les frais pour constater l'une ou l'autre réclamation sont les mêmes. Ainsi justice égale envers tous et contre tous."

Les opposants répondirent: "Que la pratique constante et invariable à Québec était que l'adjudicataire, dans tous les cas, devait déposer en Cour le montant de son adjudication à moins qu'il ne donnât caution de le payer suivant l'ordre de la Cour, et que tout créancier avait le droit de faire cette demande, même lorsqu'il apparaissait à la face de la procédure ne devoir recevoir aucune part de cet argent, qu'il suffisait d'être créancier pour faire la demande.

Que les frais de la vente par le Shérif devaient être répartis d'après le prix de l'adjudication et non pas par moitié, comme prétendu dans l'instance actuelle, et que c'était sur le même principe que devait se répartir les frais de la distribution des argents, et que tout créancier avait le droit de provoquer un jugement de distribution des argents prélevés et que ces questions avaient mainte et main-"

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te fois été décidées par la Cour Supérieure à Québec et que c'était une pratique constante, établie depuis temps éloigné."

Per Curiam.—La motion pour folle enchère et la contestation sont liées ensemble. L'adjudicataire est obligé de déposer en Cour le prix de son adjudication; en conséquence de quoi la Règle pour *folle enchère* sur lui est déclarée absolue.

Quant à la contestation du projet de distribution nul doute que les frais de vente et de Collocation ont été les mêmes pour chaque terre, et qu'il serait plausible et juste d'en faire peser le poids par justes moitiés sur chaque immeuble, mais la pratique constante à Québec a été de faire la répartition de ces frais au *prorata* du prix réalisé par la vente de chaque immeuble, et la Cour ne croit pas devoir se prononcer contre cet usage et cette pratique.

E. L. Pacaud, Proc. de l'adjudicataire G. J. Pacaud.

G. Talbot, Proc. des Opposants.

(E. L. P.)

COUR SUPERIEURE, DISTRICT DE MONTREAL.

MONTREAL, 30 SEPTEMBRE, 1862.

Coram SMITH, J.

No. 1703.

Benjamin vs. Brewster et divers, opposants,

AND

L'Hon. Geo. E. Cartier, Proc. Gen., pro Regind,

Opposant et Contestant.

Jugé:—Que la réclamation de la Couronne fondée sur un droit de *fisc* est privilégiée sur les biens meubles du débiteur insolvable.

Par son opposition afin de conserver produite le 27 novembre, 1861, l'Honorable Procureur Général de Sa Majesté, réclamait par privilège à même les deniers provenant de la vente des biens meubles du Défendeur la somme de £397 13, pour laquelle Notre Souveraine Dame la Reine avait été colloquée sur le produit de la masse des biens du failli Ruggles Wright junior; entre les mains du Défendeur Benjamin Brewster en sa qualité de Syndic à la faillite du dit Wright. Par le jugement sur le rapport de collocation (*Dividend Sheet*) rendu le 14 mars 1856, par la Cour de Banqueroute il avait été ordonné au dit Défendeur en sa qualité de Syndic de payer telle somme à Notre Souveraine Dame la Reine pour et en déduction d'un jugement qu'elle avait obtenu contre le dit Wright le 20 avril, 1843.

Le Rapport de Collocation préparé par le Prothonotaire n'ayant accordé à Notre Souveraine Dame la Reine que la somme de £8 19 1 au marc-livreur avec les autres créanciers de Brewster, l'Honorable Procureur Général contesta ce Rapport sur le principe que par la loi du pays, Notre Souveraine Dame la Reine avait un privilège sur tous les biens du Défendeur pour le paiement de sa réclamation et avait droit d'être colloquée de préférence à tous autres créanciers sur les deniers provenant de la vente des biens meubles du Défendeur qui était contraignable par corps au paiement de cette réclamation.

Pacaud,
vs.
Dubé.

Benjamin,
vs.
Brewster.

Deux des opposants en cette cause répondirent spécialement à cette contestation comme suit: "That Her Majesty had and has not the privilege for the amount of Her said claim upon the proceeds of the goods of Defendant sold in this cause and had no right to be collocated by special privilege but was properly and legally collocated therein *au marc la livre* with the other creditors of the Defendant. And the privilege invoked in the said opposition and contestation has no legal existence and ought not to be granted."

La Cour par un jugement rendu sur cette contestation l'a maintenue et a motivé son jugement comme suit:

The Court having heard the said Opposants Ferdinand Macculloch and consors, and the said Opposant Oscar A. Burton, and the Attorney General on behalf of our Sovereign Lady the Queen, Opposant, by their respective Counsel, upon the merits of the contestation by the said Attorney General on behalf of our said Lady the Queen of the Report of distribution in this cause made and filed, having examined the proceedings and proof of Record and deliberated, considering that the said Ferdinand Macculloch and Charles Hagar Opposants, and the said Oscar A. Burton, Opposant, contesting the claim of the Attorney General for Her Majesty the Queen, have altogether failed to show any good reason in law for maintaining the conclusions of their said contestation and for refusing to admit the privilege claimed by the Attorney General; and further considering that the claim of the Attorney General is based on and founded on the *droit de fisc* due to Her Majesty the Queen, the said contestations are dismissed with costs, and the claim of the said Attorney General is allowed to the extend of three hundred and ninety seven pounds thirteen shillings, with costs, rejecting the claim for interest.

L'Hon. G. E. Cartier, Procureur Général pro Regina.

Abbott & Dorman, Avocats de F. MacCulloch et al.

(P.R.L.)

MONTREAL, 31st MAY 1861.

Coram MONK, J.

No. 776.

Orr vs. Hébert.

Held:—That quoad the *cédant*, the *cessionnaire* and the *débiteur*, indirect knowledge obtained by the *débiteur* that the debt has been transferred is equivalent in its effects to acceptance or signification; provided that there is nothing equivocal in the facts upon which this knowledge is based.

2. That a partial execution of the transfer and an acknowledgment by the *cédant* that payments on account made by the *débiteur* to the *cessionnaire* are good and the failure of the *cédant* to contest the declaration made to him (as plaintiff in an action *vs* the *cessionnaire*) upon a writ of *saisie arrêt* after judgment to the effect that he the *débiteur* owes money to the *cessionnaire* in virtue of this transfer, are facts sufficiently unequivocal upon which to base this indirect knowledge.

The facts of this case will be seen by the judgment rendered, which was as follows:—

MONK J.—This is an action brought for the recovery of the sum of £129.10.6 due upon a deed of sale of a lot of land by plaintiff to defendant dated 28th Jan., 1854. The declaration alleges that the superficial extent of land held was 91 acres 30 perches, and that the price stipulated was £2 per acre, total £185.

Orr,
vs.
Hébert.

The defendant meets this action by the following peremptory exception that the land contained only fifty acres and that the entire price was therefore only £100, instead of £185, as alleged by the plaintiff. That at the passing of the deed he paid £12 10 leaving a balance of £87 10 payable in four annual instalments of £21 17 6 the first of which was to become due on the 13th of July, 1854, and so to continue annually. That by an act before Notaries dated 10th March, 1854, the plaintiff transferred to two persons of the name of Jamieson and Vicherman, among other things, the debt above mentioned. That the defendant having been informed of this transfer on the 17th August, 1855, paid £37 2 6 to Vicherman one of the parties to whom the transfer was made. That afterwards on the fifth October, 1855, defendant paid to the same party £5 0 0, so that on the 13th July, 1855, there remained due only the sum of £6 17 on the second instalment. On the 13th July, 1856, another instalment of £21 10 became due, making with the last named sum £28 7; but the defendant alleges that the plaintiff never became proprietor of the debt after transferring it to the parties above named, and hence has no right to claim the same by this action. Moreover it is further set forth that the plaintiff obtained judgment against Jamieson and Vicherman on the 27th October, 1855, for a large sum of money, and upon this judgment, on the 10th November, 1855, *saisie arrêt après jugement* issued to attach in the hands of the defendant all moneys by him owing to Jamieson and Vicherman. That on the 4th December, 1855, the defendant declared that he owed Messrs. Jamieson & Vicherman the balance of the purchase money thus transferred and this writ of *saisie arrêt* is still in full force, and the defendant prays that present action be in consequence dismissed. The plaintiff answers that he has always been ready to give credit to defendants for moneys paid to Vicherman and Jamieson and offers to give security that defendant will never be troubled by them for moneys now sued for. It is also alleged in the answer that the declaration of the defendant as *tiers saisie* above referred to was not a declaration upon which the plaintiff could obtain judgment, and that Vicherman and Jamieson have absconded from this province.

The evidence adduced establishes the fact of the transfer of the 10th March, 1854, and the payment by alleged defendant to have been made by him to Jamieson and Vicherman, also the issue of the *saisie arrêt* and the seizure of the money in the hands of the defendant as belonging to Jamieson and Vicherman, and the plaintiff's omission to contest the declaration of defendant as *tiers saisie*.

The question of law which the court is now called upon to decide is simply this: Whether the indirect knowledge obtained by a debtor that the debt owing by him has been transferred is or is not, in so far as the *cédant*, the *cessionnaire* and the *débiteur* are concerned equivalent in its effects to acceptance or signification. Every lawyer is aware of the controversy which existed for many years in France upon this point, and of the contradictory *arrêts* which were rendered. The opinion however which has prevailed is that in so far as regards these parties the transfer does take effect by this indirect knowledge. Troplong in his *Contrat de Vente* No. 900, commenting upon the opin-

Orr,
vs.
Hébert.

ion of Ferrière and Brodeau says : "elle compte la Cour de Cassation parmi ces adversaires, et je crois que si les faits dont on veut induire la connaissance du transport par le débiteur ont quelque chose de non équivoque, si elles ne laissent aucun doute sur la volonté du cessionnaire de se prévaloir de la cession les adversaires de Ferrière doivent l'emporter." Here there is not only no doubt, but the *transport* received its execution in part : payments were made to the *cessionnaire* by the *débiteur* which are acknowledged to be good by the *cédant* himself, apart from the *saisie arrêt* and the uncontested declaration of the defendant as *tiers saisi* that he owed money to Jamieson and Vieherman in virtue of the transfer of the 10th March, 1855. I am of opinion that the facts and the law of the case impose upon the court the obligation of dismissing this action with costs. It is dismissed. The plaintiff may have recourse upon the *saisie arrêt*.

A. & W. Robertson, for Plaintiffs.

Leblanc & Cassidy, for Defendants.

J. G. K. H.

SUPERIOR COURT.

MONTREAL, 22ND SEPTEMBER, 1863.

Coram BERTHELOT, J.

No: 2206,

Rose, vs. Coullée & Coullée, Opposant.

HELD:—That an assignee of a Plaintiff cannot, by motion, claim to be made a party to a cause, the proper course being to apply by Petition, he being a stranger to the record.

This was a motion by one Robert Conroy, who claimed, for the reasons assigned at length in the motion, to be permitted to appear in the cause, as the *cessionnaire* of the Plaintiff, for the purpose of contesting an *Inscription de faux* made and filed by the Opposant.

Bethune, showing cause, contended that as the applicant was a stranger to the record, he had no right to make a motion in the case, and that his proper course was to proceed by Petition.

Per Curiam:—It is necessary here to regulate the proper mode of procedure, and, in doing so, the Court does not hesitate to say, that a stranger cannot make a motion in a cause, and that his first step ought to be to petition the Court to be allowed to intervene. The party will therefore take nothing by his motion.

Motion rejected.

R. & G. Lafamme, for Plaintiff and Applicant.

Strachan Bethune, for Opposant.

(S. B.)

CIRCUIT COURT.
MONTREAL, 30 JUNE, 1863.

CORN MONK, A. J.

No. 457.

Atwater et al vs. Bouthillier

HOLD: 1st That in estimating for duty the market value at the place of importation of goods imported from a foreign country, such value will be taken to be the value of such goods by a gold or other standard corresponding in value with the standard of the currency in which the duties are payable.

2d That upon this principle, goods imported from the United States should be estimated for duty by a gold standard that being a standard corresponding in value with Canadian currency.*

The defendant was sued for the revendication of a cask of linseed oil detained by the Customs at Montreal, and valued at \$43.20.

The declaration purports to be for refusing to deliver to plaintiffs a cask of linseed oil then in the Examining Warehouse, and part of a lot entered on the 25th October, 1862.

On that day, the plaintiffs entered 31 casks of linseed oil, one of which was sent to the Examining Warehouse. On inspection of the invoice it was found to be made out, not in the prevailing currency of the United States of America, where the same were purchased, but at the gold value and was paid in gold or exchange.

The appraiser insisted on a post entry to bring the value up to the paper currency and detained the cask in store until it was done.

The question therefore had reference to the payment of the duty on the gold price of the article instead of on the true market value thereof at the place of exportation, and that question was submitted to the court upon the pleadings and admissions of fact made by the parties.

The plea of the defendant is as follows.

The defendant, without admitting any of the allegations contained in the plaintiff's declaration, except in so far as hereinafter admitted, for plea to this action saith: That the invoice of the thirty one casks of linseed oil in question in this cause was made out not in the prevailing currency of the United States of America where the same were purchased, but at the gold value and in fact were paid in gold or exchange.

That in fact the actual cost in New York as stated in said invoice was not the true and fair market value at the time and place of the purchase of said thirty one casks of linseed oil but on the contrary the true and fair market value thereof at the place of their exportation was quite different from the one stated in said invoice.

That the one stated in said invoice was seventy-five cents per gallon, whilst the true and fair market value thereof at said place of exportation was ninety cents per gallon.

That the duty of twenty per cent. imposed by law on said goods, amounting according to the prevailing currency of the said United States at the time and place of said purchase of said goods to the sum of \$235.40, which the plaintiffs have not paid, except \$196.20, leaving still due a balance of \$39.20.

* 22 Vic. Cap. 17 Sec 24.

Atwater et al.,
vs.
Bouthillier.

That the said plaintiffs paid only \$196.20, as and for the duty of twenty per cent. as if the true and fair market value was only seventy five cents per gallon, whilst the true and fair market value of said linseed oil at the time and place of exportation was ninety cents per gallon.

That the said defendant had a right to make and did insist on making a post entry to bring the value thereof up to the paper currency of the place of exportation at the time of such purchase, and the said plaintiffs although called upon to pay the duty according to law, have always refused to do, and therefore are still indebted to the amount of \$39.20 for said balance of duty so due and owing by them, and cannot claim the said cask of linseed oil until such balance be paid.

Wherefore the said defendant prays that this action be hence dismissed with costs.

The parties in this cause admitted that the thirty-one casks of linseed oil mentioned in the plaintiff's declaration and in the invoice thereunto annexed were purchased by the plaintiffs in the city of New York in the state of New York, one of the United States of America, and were by them entered at the custom house in the port of Montreal, on the twenty-fifth day of October, 1862, at the price stated in said invoice, namely the sum of nine hundred and eighty-one dollars, which was the price actually paid by the plaintiffs in New York aforesaid and was at the time of the purchase and at the time of said entry the actual value at New York aforesaid of said quantity of oil, in gold coin of the United States of America of equal, nominal and actual value with the current money of Canada or in currency equivalent to such gold coin, and that the plaintiffs paid to the defendant as collector of customs at said port in current money of equivalent nominal and actual value with the said gold coin, as duties on said goods, twenty per cent. upon the amount or value of said goods as stated in said invoice, to wit: the sum of one hundred and ninety-six dollars and twenty cents current money of Canada; and received from the proper officer a permit for the delivery of said oil to plaintiffs, who received thirty casks of said oil, one being retained at the examining warehouse by the defendant who still retains the same on the ground that he has a right to make a post entry and to oblige the plaintiffs to pay a balance of thirty-nine dollars and twenty cents currency as and for the balance of the duty of twenty per cent. on said goods according to his statement annexed to his plea, which balance the plaintiffs have been called upon to pay upon a post entry which the defendant did insist to make but of all which the plaintiffs refused and that the paper writings plaintiffs' exhibits, &c., are true copies of the said permit and of the reports of the entry of said goods.

That at the time of the purchase in New York aforesaid there was current in the said United States a certain issue of paper inconvertible into gold, and bearing at the time of the said purchase nominally a like value with the said gold coin, but in fact bearing a real value less by twenty per cent. than the said gold coin, the rate of exchange from Canada aforesaid to New York aforesaid being at an equivalent premium of exchange in favor of Canada, and that the value of the said oil in the said paper currency at the time of said purchase was eleven hundred and seventy-seven dollars and twenty cents.

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That the value of said cask of linseed oil at Montreal aforesaid is forty-three dollars and twenty cents Canadian currency.

MONK, A. J.—The plaintiffs, Messrs. E. Atwater & Co., purchased at New York a certain quantity of linseed oil. The invoice showed that the articles were of a certain value. The invoice was all right, but the collector thought he was justified in charging the duty according to the paper currency of the United States. Messrs. Atwater & Co. paid duty on the 25th October, 1862, according to the value in gold which was a standard common to the two countries. But the defendant claimed that he was entitled to duty according to the amount which the plaintiffs would have paid for the articles if they had paid in paper currency.

The collector had detained one barrel of the linseed oil to meet this excess of duty.

The Court believed his pretensions to be utterly unfounded.

The collector had no right to go and examine the paper currency of the United States. The action of the plaintiffs for the recovery of the barrel of oil must be maintained, and the collector declared unjustified in making the distinction which he had made.

Gold being a standard, it was upon this that the value of all goods in New York must be determined.

The judgment was rendered as follows:

The Court having heard the parties, examined the proceedings, seen the admissions filed by the parties and having deliberated, doth adjudge and condemn the defendant to deliver up to the plaintiffs, within 15 days, the cask or barrel of linseed oil, their property which was duly entered by them at the Custom House, at said port, on or about the 25th day of October last past, and the duties thereupon paid by them, but which the defendant without any legal claim thereupon for duties or other charges, and without legal right detained, and refused to deliver to plaintiffs, and in default thereof to pay and satisfy to the plaintiffs the sum of forty-three dollars and twenty cents value of the said cask or barrel of linseed oil with interest thereon from the 24th of January last, the whole with costs *distracts* to Mr. Dorman, Attorney for Plaintiffs. Judgment for Plaintiffs.

S. W. Dorman, Attorney for Plaintiffs.

P. R. LaFrenoye, Attorney for Defendant.
(P. R. L.)

MONTREAL, 11TH JUNE, 1863.

Coram BADGLEY, J.

No. 2682.

Derepintigny vs. Doherty.

Meid:—That after default is entered and judgment pronounced *ex parte* during term, such judgment and default may be set aside and an appearance and plea to the action permitted to be filed on motion supported by an affidavit to the effect that it was through negligence or error of Defendant's Attorney that appearance and plea had not been filed.

This was an action for real damages done to the Plaintiff's house by the Defendant when he (Defendant) occupied it as tenant, being bound to deliver up the house at the expiration of his lease in good repair, reasonable wear and tear being allowed. The writ was returned into Court on the 2nd of June last.

Atwater et al.,
vs.
Bouthillier.

Derepentigny Default was entered only on the 5th. On the 10th, the first day of the term,
vs. judgment was given to Plaintiff on proof duly made.
Doherty.

The next day, 11th June, M. Doherty Esq., made the following motion :

DISTRICT OF MONTREAL, CIRCUIT COURT.

Pierre Derepentigny, Pltff. vs Patrick Doherty, Deft.

Motion by the Defendant that upon the affidavit herewith produced, the default in this cause entered be taken off, and that he be permitted to appear and plead therein upon payment of such costs as this Honorable Court may order. Montreal, 11th June, 1863.

M. Doherty, Defendant's Attorney.

The undersigned, Defendant's Attorney in this cause, being sworn, says, that the Defendant placed the copy of writ and declaration, herewith produced, in his hands with instructions which are a good defense to this action in order to plead in and defend the same, that the return day in said copy of writ written to wit the "deuxième" resembling at first sight the word "dixième" this deponent was led into error by said resemblance, and got the impression that said writ was returnable on the tenth of June instant instead of on the second. That this deponent was present in Court yesterday at the calling of the new cases waiting to appear in said case, and it was not until the clerk of the Court in calling said cases had passed this case without calling the same that this deponent upon enquiring into the cause, discovered by careful observation that this case was returnable on the second instant instead of the tenth. That this action being for damages, this deponent from his instructions has strong reason to believe that great injustice will be done to the Defendant unless he is permitted to plead to this action which he here offers to do instant and to pay such costs as this Court may think right in the premises.

Sworn and acknowledged
 before me this eleventh
 day of June, 1863.

M. Doherty, Attorney for Defendant.

The motion and affidavit were dated and presented on the 11th of June, without notice to the opposite party. Ricard, the Plaintiff's attorney who happened to be present in Court when the motion was made, attempted to show that those proceedings were illegal and though not objecting to the want of notice of motion, could not consent to waive his rights to his judgment. He maintained that a judgment could not be set aside on a mere motion, that the law gave us some special means of accomplishing that end, and it was necessary to apply the law to that effect.

BADGLEY, J.—Ruled that Defendant could not suffer by his attorney's negligence or error, that the affidavit filed in support of motion went to establish that it was by Mr. Doherty's oversight that an appearance had not been filed in due time. So he would grant the motion and order the Defendant to plead forthwith.

Motion granted, judgment and default set aside.

L. Ricard, for Plaintiff.

M. Doherty, for Defendant.

(J.L.M.)

MONTREAL, 27 FEBRUARY, 1863.

Coram Monk, J.

No. 5682.

Girouard vs. Lachapelle et vir.

Held: That both husband and wife *séparée de biens* are jointly and severally liable for a joint note made in the course of a business in which they were both jointly interested.

In rendering judgment His Honor said :—

This action was brought on a promissory note signed by husband and wife *séparée de biens*.—The plea was that the wife signed the note not as a partner in the business but as security for her husband, which was illegal—but the evidence proved that the note was made in the ordinary course of a business, in which both husband and wife were jointly interested. Judgement must therefore go against both defendants jointly and severally.

Jetté, for Plaintiff.

Royal, for Opposants.

(J. G. K. H.)

COUR DE CIRCUIT—DISTRICT DE JOLIETTE.

JOLIETTE, 16 NOVEMBRE, 1863.

Coram C. J. LABERGE, J. A.

No 2968.

Martin Gravelle vs. Louis Beaudoin.

BILLET NOTARIÉ EN BREVET—PRESCRIPTION.

JUGE: qu'un billet notarié *en brevet*, quel qu'il soit dit payable à ordre, n'est pas prescriptible par cinq ans.

La poursuite était fondée sur un billet passé devant M^{tres} Désauniers et collègue, Notaires, le 30 Octobre 1855. Une exception de prescription de cinq ans, celle établie par le statut contre les billets promissaires, fut opposée à l'action, et l'on cita à l'appui de ce moyen de défense : 3 *Jurist* p. 55, *Morin vs. Legault* SMITH J., 6 *Jurist*, p 257, *Crevier vs. Sauriole*, même juge : 9 *L. C. Rep.*, p 419 *Lavoie vs Crevier*, Cour d'Appel.

Per Curiam. Des précédents cités, il n'y a que ceux de la Cour de Circuit qui soient applicables et ces précédents étant, dans l'opinion de la Cour, en conflit avec le droit du pays, qui est le droit français, même en matière de commerce, excepté en ce qui concerne la preuve, il faudrait que la Cour d'Appel eût finalement prononcé sur cette question pour faire prévaloir la jurisprudence sur ce que cette cour considère comme un point de droit bien établi. En conséquence la Cour déboute l'exception de prescription.

Exception déboutée.

Melançon & Beaupré, Avocats du Demandeur.

G. A. Champagne, Avocat du Défendeur.

(J. D.)

MONTREAL, 31 MARS, 1846.

Coram ROLLAND J., GALE J., DAY J.

No. 1711.

Dubois vs. Hébert.

SÉDUCTION, PATERNITÉ, ENFANT.

JURY.—Que durant la première enfance, l'enfant naturel est laissé sous les soins et en la possession de la mère; mais qu'après les premières années, le père doit avoir l'alternative de prendre son enfant avec lui ou de continuer à en payer l'entretien à la mère.

Jugement.—La Cour après avoir entendu les parties par leurs avocats, après avoir examiné la procédure, pièces produites et preuve et en avoir délibéré, déclare le Défendeur père de l'enfant dont la Demanderesse est accouchée le huit Novembre 1841; et en conséquence condamne le Défendeur à payer à la Demanderesse la somme de £24. 0s. 0d. du cours actuel de la Province du Canada tant pour frais de gésine que pour le soutien du dit enfant, jusqu'au jour de l'assignation du dit Défendeur dans la présente action, nommément jusqu'au 24^e jour d'Août, 1844, et aux dépens de cette action dont distraction est accordée à Messrs. Cherrier & Dorion, avocats de la Demanderesse. Et la Cour ordonne au dit Défendeur de payer à la Demanderesse, à partir du dit jour 24 Août, 1844, et jusqu'à ce que le dit enfant ait atteint l'âge de six ans, le somme de £6. 0s. 0d. dit cours par année pour le maintien du dit enfant, et après que le dit enfant aura atteint le dit âge de six ans, la Cour condamne le Défendeur comme père du dit enfant d'en prendre soin, de le nourrir, vêtir et élever convenablement; et à défaut par lui de ce faire, condamne le Défendeur à payer à la Demanderesse la somme de £6. 0. 0. dit cours par année d'avance à compter du jour que le dit enfant aura atteint l'âge de six ans, pour la nourriture, besoin et l'entretien du dit enfant, et ce jusqu'à ce que le dit enfant ait atteint l'âge de dix ans.

Cherrier & Dorion, pour la Demanderesse.

R. A. R. Hubert, pour le Défendeur.

(J. D.)

COUR SUPERIEURE.

MONTREAL, 29 SEPTEMBRE, 1863.

Coram BERTHELOT J.

No. 711.

Doutre, vs. Gosselin & Gabouriault, opposant.

JURY. 1^o. Que lorsque, dans la contestation d'un article de collocation ou distribution, le titre, sur lequel l'opposant a été colloqué, est contesté, les frais seront accordés, comme si l'opposition elle-même eut été contestée.

2^o. Que la classe des frais, dans ce cas, est réglée, non par le montant de la collocation, mais par la somme réclamée par l'opposant.

3^o. Que l'opposant est considéré comme Demandeur et le contestant comme Défendeur, pour déterminer les frais dus à chacune des parties.

Dans cette cause, l'opposant Gabouriault avait été colloqué pour £36. 0s. 0d. en déduction de cette partie de son opposition au montant de £179, comme cessionnaire de Dame Céleste Mora dite Laforme, épouse du Défendeur, créancière de ce dernier par contrat de mariage, avec lui, en date du 24 Mai, 1848.

Doutre
vs.
Gosselin.

Le Demandeur contesta l'article du projet de distribution qui colloquait ainsi l'opposant sur le motif que le jugement de séparation de biens, qui avait rendu la cédante de l'opposant créancière de son mari, de la somme par elle cédée à l'opposant, était nul, vu qu'il avait été obtenu dans un district étranger au domicile des parties et en fraude des créanciers.

Sur cette contestation la procédure fut liée comme dans une action ordinaire et il y eut preuve testimoniale sur les faits débattus. Le jugement de la cour renvoya la contestation avec dépens. Les avocats de l'opposant firent leur mémoire de frais, comme s'il s'agissait d'une opposition contestée; mais le protonotaire ne leur accorda que les frais d'une contestation de collocation, ce qui faisait une différence de \$40 sur un seul item du mémoire.

Par motion du 26 Septembre, 1863, ils demandèrent à la Cour de reviser cette taxe, alléguant que le titre qui servait de base à l'article de collocation contesté, ayant été attaqué de nullité, la contestation devait être considérée comme attaquant l'opposition elle-même; que la procédure avait été instruite avec autant de détails et de trouble que dans une action ordinaire et qu'il n'y avait aucune raison de taxer les frais autrement que dans une cause ordinaire.

Le Demandeur répondit que le tarif n'ayant pas fait d'échelle pour régler les frais d'après le plus ou le moins d'importance des contestations de distribution, la Cour ne pouvait méconnaître le tarif et faire des distinctions qui seraient toujours plus ou moins arbitraires; qu'en effet, il y avait eu articulations de fait, conseils à l'enquête, preuve testimoniale, comme dans les causes ordinaires, mais que le protonotaire avait accordé les honoraires attachés à ces vacations, en sus des honoraires de contestation, et que la revision de la taxe ne pouvait pas améliorer le mémoire à cet égard; que le tarif (art. 36, 37, 38 et 39) avait fixé les frais sur toutes les contestations de rapport de distribution, attribuant au contestant la qualité de Demandeur et à l'autre partie celle de Défendeur; qu'en supposant même que le principe invoqué par cette motion put être accepté par la Cour, la classe des frais devait être déterminée par le montant de la collocation et non par celui réclamé dans l'opposition,—que le montant *colloqué* était la mesure de l'intérêt des parties.

Jugement accordant la revision de la taxe, comme sur une contestation du fond de l'opposition; suivant l'art. 50 du tarif et ce qui est demandé par l'opposant.

BERTHELOT J.—Ce jugement est d'accord avec l'opinion de mes collègues sur le banc.

Motion accordée.

Bélanger & Deenoyers, pour l'opposant.

Doutre & Daoust, pour le Demandeur.

(J. D.)

MONTREAL, 13 FEVRIER, 1863.

Coram Monk, J. A.

No. 978.

Chenier, père vs. Coutlée, et al.

Jugé :—Que la prestation suivante portée dans un acte de donation " de nourrir le donateur à son pot et feu, de le chauffer et éclairer," n'est pas productive d'arrérages; et qu'une mise en demeure légale doit être faite à la partie obligée pour la contraindre au service de cette prestation, le Défendeur ayant toujours été prêt à se conformer à son obligation.

Le 12 mars, 1849, le demandeur donne à son fils Antoine, une terre de 3 arpents sur 20, aux Cèdres, à la charge de nourrir le Demandeur, son père, à

Chenier père
Coutlée et al.

son pot et feu, de le chauffer et éclairer, le tout sa vie durant. Cette prestation est estimée valoir \$8 par mois, formant \$288 pour les 12 années échues le 12 mars 1861. Antoine Chenier a été requis et mis en demeure de remplir ses obligations, et a refusé et refuse encore de le faire. Les deux autres Défendeurs Coutlée et Dupont sont en possession de la terre donnée à Antoine Chenier fils; le Demandeur est âgé de 86 ans, incapable de pourvoir à sa subsistance et à celle de son épouse âgée de 74 ans; et vu le refus du dit Ant. Chenier fils, de remplir ses obligations, le Demandeur est bien fondé à demander la résiliation de la donation et à être mis en possession de la terre donnée; les conclusions sont à cet effet et l'on demande que le jugement soit commun entre les parties Défenderesses.

Le Défendeur Antoine Chenier fils a plaidé à l'action que l'acte du 12 mars 1849, est de nature aléatoire et que les charges qui y sont portées sont aussi de même nature; que ces charges ou prestations n'arréragent pas; que le Demandeur n'allègue pas de mise en demeure légale et régulière faite à Antoine, son fils, ni aux deux autres Défendeurs, d'exécuter les susdites prestations; depuis le 12 mars 1849 le Demandeur a reçu convenablement, et s'est passé volontairement du service de ces dites charges; que le Demandeur est créancier d'autres rentes et revenus et d'un chemin de péage; que le Défendeur Antoine Chenier fils n'a jamais refusé de recevoir le Demandeur chez lui et qu'il a toujours été et est encore prêt à le recevoir. Les deux autres Défendeurs ont offert les mêmes moyens de défense et disent de plus qu'il sont possesseurs de la terre de bonne foi et sans fraude.

Voici le jugement:

La Cour.....ayant examiné la procédure et pièces produites et sur le tout murement délibéré, vu la motion du Demandeur produite le 25 novembre, 1862, pour rejeter la déposition de François Xavier *alias* Olivier Dupont, témoin examiné en cette cause, accorde la ditte motion avec dépens, et rejette la déposition du dit Dupont.*

Considérant qu'il n'est pas établi par la preuve produite en cette cause que le Défendeur, Antoine Chenier fils, ait jamais été légalement mis en demeure de faire les charges et prestations portées et stipulées en faveur du Demandeur, dans et par l'acte de Donation en date du 12 mars 1849; considérant qu'il n'est pas établi par une preuve légale et suffisante que le dit Défendeur Antoine Chenier fils, ait jamais refusé de nourrir le Demandeur, son père, à son pot et feu, ou de le loger, chauffer et éclairer, tel que convenu dans et par l'acte de Donation du 12 mars, 1849, mais au contraire, il est prouvé qu'il a toujours été prêt à nourrir, chauffer et éclairer son père le dit Demandeur, suivant ses moyens, et qu'il est prêt encore de le faire; vu que sous ces circonstances, les charges et prestations personnelles portées dans l'acte de donation du 12 mars, 1849, n'ont pas suivant la loi, arréragé tel qu'il est prétendu par le Demandeur dans sa demande et

* Ce témoin est un des Défendeurs. Il a plaidé conjointement avec Coutlée et le Défendeur Antoine Chenier fils a examiné Dupont comme son témoin. Le Demandeur y a objecté sur le principe que Dupont, était partie intéressé au procès, et un des Défendeurs. Qu'il offrait les mêmes moyens de défense que A. Chenier, fils.

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déclaration, et que de fait et de droit, les arrérages réclamés par le dit demandeur ne sont pas accrus en sa faveur; considérant qu'il n'est pas prouvé que le défendeur Antoine Chenier fils ne soit pas capable de nourrir le demandeur son père, à son pot et feu, ou de remplir toutes les autres charges et obligations portées dans l'acte de Donation du 12 mars 1849, mais au contraire qu'il résulte de la preuve, qu'il est en moyen de remplir telles charges et obligations; considérant d'abondant qu'il est prouvé que le dit Demandeur a des revenus et des moyens suffisants pour le faire vivre entièrement indépendant de son fils, le dit défendeur Antoine Chenier fils; considérant que quant aux autres défendeurs Coutlée et Dupont il n'est pas prouvé qu'ils soient en possession, comme propriétaires de la dite terre donnée par le demandeur au défendeur Antoine Chenier fils, par l'acte du 12 mars 1849, par dol ou fraude, mais au contraire qu'ils sont propriétaires de la dite terre, de bonne foi et en vertu de titres bons et valables, maintient les exceptions produites par les dit défendeurs respectivement, et a débouté et déboute l'action et demande du dit demandeur avec dépens, distracts, etc.

Chenier père
vs.
Coutlée et al.

Dorion & Dorion, pour le Demandeur.

Moreau, Ouimet & Chapleau, pour les Défendeurs.

(s.o.)

MONTREAL, 31st OCTOBER 1863.

Coram MONK, A. J.

No. 2319.

Martin & vir., vs. *Martin*.

SPECIAL ANSWER.

Held:—That a Plaintiff cannot by a special answer to a plea, founded upon a deed to which he was a party, and which deed would defeat his action, set up grounds of nullity against such deed and ask the rescission thereof, and that the nullity of such deed should have been asked by the declaration.

This was an action instituted by the plaintiff, Margaret A. Martin, against her father, for an account and *partage* of the *communauté tripartite* heretofore existing between the defendant, his second wife, and the said plaintiff, issue of the defendant's first marriage.

To this action the defendant pleaded, that by a certain deed passed before notaries, previous to the institution of the plaintiff's action, the said plaintiff, being of age, had sold to him all her rights, titles, and interest in the said *communauté* and in the estate of her mother.

The plaintiff, Margaret A. Martin, by her special answer, attacked the validity of the sale made by her to her father, upon the ground that it was fraudulent, and that she had been induced to sign the said deed by the false representations made to her by defendant, as to the real value of her rights and interest in said estate, and concluded that the said deed be declared null and void and of no effect, and be set aside.

Upon the production of this special answer, the defendant moved that it should be rejected, as being irregularly pleaded, for, amongst other reasons, the following:

Martin et vir.
vs.
Martin.

1st. Because the plaintiff could not by a special answer ask the nullity of a deed to which she was a party, and which could only be set aside upon a direct action.

2nd. That the said special answer contained allegations or conclusions which should have formed part of the plaintiff's declaration.

3rd. That the said special answer contained new and different grounds of action.

Defendant cited, in support of his motion :

1 *Auton*, *Traité des Nullités*, p. 281.

Marcoux vs. Bergevin, Queen's Bench, Montreal, 19th October, 1846.

McGoey vs. Griffin, 1 L. C. Jurist, p. 39.

The plaintiff opposed the motion upon two grounds ;

1st. That a motion was not the proper proceeding to test this special answer, but that it should have been done by demurrer.

2nd. That she had regularly pleaded.

The Court was of opinion that the motion was the proper mode of dealing with this special answer, which was altogether irregular for the grounds set forth in the motion.

Motion granted and special answer dismissed with costs.*

Motion granted.

Kerr & Nagle, Attorneys for Plaintiffs.

Dorion & Dorion, Attorneys for Defendants.

(V. P. W. D.)

SUPERIOR COURT.

MONTREAL, 30TH JUNE, 1863.

Coram SMITH, J.

No. 1096.

Guyon dit Lemoine vs. Lionais.

Held:—That a case is not concluded on the default of the Defendant to answer interrogatories *sur faits et articles*, if it is susceptible of further testimony.

2. A party to whom interrogatories *sur faits et articles* have been submitted may answer them at any time before the case is concluded.

Per Curiam.—Two motions had been made in this case by the Plaintiff against the Defendant, based upon the fact that to both series of interrogatories, proposed to him, the party had made default to answer. That having made default to answer any of these questions, the case was concluded, and that the default entitled the Plaintiff to have judgment entered in his favour, the proof on his part being made, inasmuch as the interrogatories covered the whole case. In France, it appeared that, where parties were called upon to answer interrogatories on *faits et articles*, and they refused to answer, the Plaintiff called upon the Judge to consider the interrogatories as admitted, and enter up judgment in his favour. There was no doubt that there was much wisdom in this rule, and in the case cited from Pigeau, the rule had doubtless, been acted upon very judi-

*On the same day a similar decision was given by Mr. Justice Berthelot, in *Remillard et al. vs. Beaudin et al.*

ciously. When a defendant, for example, was called upon to answer respecting a loan, and the case was one not susceptible of further testimony, the interrogatories were conclusive upon the subject, and the proof was made. In such a case there would, of course, be sufficient to enter up judgment upon. But take the present case. The action had been going on four or five years, and the parties had been at *enquête* for two years and a half. Thirty or forty witnesses had been examined, and a great variety of issues had been raised, and now a second series of interrogatories had been served upon the Defendant. The Defendant made default, and now the Plaintiff moved that inasmuch as these interrogatories had not been answered, and inasmuch as they covered the whole of the issues between the parties, that judgment be entered up for the Plaintiff. But there was no such practice in this country. In those cases in which it was admitted, there was no other evidence, the interrogatories finished the whole matter. But here the parties had been taking evidence for years, and were proceeding with the instruction of the Court on the case. The rules of procedure on this subject had been interpreted uniformly until lately. The first interpretation was that under the ordinance of 1667, according to which the parties were at liberty at any time to come up and answer the interrogatories. The point came up at Quebec, and it had there been held that the right to answer must be limited to the duration of the *enquête*. But this rule had not been adopted here, and our practice continued to be that the party might come up and answer on *faits et articles* any time before the case had been concluded. The motion must therefore, be dismissed. But before concluding upon this first point, it was proper to remark that there were two sets of interrogatories in this case, and it did not appear that any default had ever been entered in the books of the Court, with respect to the first set. If there were no such entry, it was clear that no judgment could be given on this motion. There was a second motion, which said that, inasmuch as this case had been going on for three years at *enquête*, inasmuch as a great many witnesses had been examined, and they had answered nothing, and nothing had been proved, that judgment be entered up for the defendant. This was a singular motion, and must of course be rejected.

Fleming, for Plaintiff.

Leblanc & Cassidy, for Defendant.

(J.L.M.)

Motion rejected.

MONTREAL, 23RD SEPTEMBER, 1862.

Coram MONK, A. J.

No. 846.

Ex parte Louis Coulon et al.

Petitioners for a Writ of Prohibition.

COURT OF VICE-ADMIRALTY—JURISDICTION.

Held:—That the Court of Vice Admiralty has jurisdiction throughout Lower Canada, to attach a sea going vessel to answer a suit instituted in that Court.

The petitioners presented a petition to the Superior Court setting up in effect that on the 8th September, 1862, they having been mariners on the brigantine "Adonis" from Halifax, had obtained judgments before Charles J. Coursol, Esq.,

Guyon dit
Lemcine
vs.
Lionais.

Ex parte
Coulton et al.

judge of the Sessions of the Peace, at Montreal, against George Lavoie, the Captain of the "Adonis," for wages.

That on the 12th September, warrants of distress were issued from the Police Court against the vessel "Adonis," for the payment of the said judgments.

That John Bates, a constable of the Police Court, took the said vessel in execution at Montreal, under the said warrants, and fixed the 18th September as the day of sale, but on the 16th September, he received the order of the Court of Vice admiralty to suspend further proceedings inasmuch as the "Adonis" was already under seizure, made at Montreal in a suit begun in the said Court of Vice admiralty at Quebec, for the payment of a certain bottomry bond made at Halifax, Nova Scotia, payable on arrival of the vessel at Montreal.

That the order of the Court of Vice Admiralty was executed at the City of Montreal by the seizure of the vessel there on or about the 11th September.

That the said John Bates on the 17th September received a summons to appear before the said Court of Vice Admiralty at Quebec on the 26th September on a charge of contempt of the said Court, in having taken the said vessel in execution under the said warrants.

That the petitioners were aggrieved by the premises.

1°. Because the said Court of Vice Admiralty had no jurisdiction over any vessel in the port of Montreal.

2°. Because the jurisdiction of the said Court of Vice Admiralty does not extend beyond the ebbing and flowing of the tide, which does not extend to Montreal.

The prayer of the petition was in effect that the Superior Court would issue a writ of prohibition addressed to Henry Black, the judge of the said Admiralty Court prohibiting him from maintaining the warrant of arrest on the bottomry bond as having been issued without jurisdiction unless causes to the contrary be shown on a day to be named by the Superior Court.

Girouard for the petitioners argued at length in support of the petition that the law and the Commission of Her Majesty to Henry Black, judge of the Court of Vice Admiralty gave him no jurisdiction beyond the ebbing and flowing of the tide. Stuart's Vice Admiralty Cases, p. 376 and seq.

The Court rejected the petition *inter alia* on the ground that the jurisdiction of the Vice Admiralty Court, extended throughout Lower Canada.

Petition rejected.*

D Girouard, for Petitioners.

(F.W.T.)

* LETTERS PATENT APPOINTING JUDGE.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To our well beloved HENRY BLACK, Esquire, Greeting.

We do by these presents, make, ordain, nominate, and appoint you the said Henry Black, to be our commissary in our Vice-Admiralty Court, in our provinces of Lower Canada in America, and territories thereunto belonging. And we do hereby grant unto you full power to take cognizance of, and proceed in, all causes civil and maritime, and in complaints, contracts, offences, or suspected offences, crimes, pleas, debts, exchanges,

MONTREAL, 31st OCTOBER, 1863.

Coram BERTHELOT, J.

No: 2284.

Fenn vs. Bowker.

Held—That in the case of an absentee, the service of a Rule for the examination of the absentee upon interrogatories *sur faits et articles* made at the office of the Prothonotary, is insufficient.

The Plaintiff in this cause was of Rochester in the State of New York, one of the United States of America.

On the 2nd October, 1863, the Bailiff served a Rule together with the interrogatories *sur faits et articles* addressed to the Plaintiff, at the office of the Prothonotary in Montreal, and certified that, the Plaintiff had no domicile in the city or District of Montreal or in the Province of Lower Canada.

The Plaintiff having been called to answer to the exigency of this Rule on the 6th October, 1863, made default.

On the 21st October, the Plaintiff moved as follows :

Motion on behalf of the Plaintiff that a certain paper writing purporting to be interrogatories *sur faits et articles* and the rule thereunto annexed be rejected from the record in this cause, and that the Plaintiff be declared not to have been in default, and that such ruling entered in reference thereto be considered and charged accordingly, for the following, among other reasons :

1st. That the Plaintiff before and since the institution of this action has resided in a foreign country namely in the United States of America and cannot be served with a rule in the manner attempted in this cause.

2. That the Plaintiff is described in the writ in this cause issued as of Rochester in the State of New York, one of the United States of America, and it does not appear that he was ever domiciled in Lower Canada ; and in con-

polices of assurances, accounts, charter parties, agreements, bills of lading of ships and all matters and contracts, which in any manner whatsoever relate to freight due for ships hired and let out, and transport money or maritime usury, otherwise bottomry, or which do any way concern suits, trespasses, injuries, extortions, demands, and affairs civil and maritime whatsoever, between merchants, or between owners and proprietors of ships or other vessels, and merchandises, or other persons whomsoever, with such owners and proprietors of ships and all other vessels whatsoever, employed or used, or between any other persons howsoever, had, began, made or contracted, for any matter, cause or thing, business or injury whatsoever, done or to be done as well in, upon or by the sea, or public streams, fresh waters, ports, rivers, creeks and places overflowed whatsoever, within the ebbing and flowing of the sea, or high water mark, as upon any of the shores or banks adjoining to them or either of them, together with all and singular their incidents, emergents, dependencies, annexed and connexed causes whatsoever :—and such causes, complaints, contracts, and other the premises aforesaid, or any of them, howsoever the same may happen to arise, be contracted, had or done, to hear and determine according to the civil and maritime laws and customs of our High Court of Admiralty of England, in our said province of Lower Canada, and maritime parts of the same, and thereto adjacent whatsoever, and also with power to sit and hold Courts in cities, towns and places, in our Province of Lower Canada aforesaid, for the hearing and determining of all such causes and businesses, together with all and singular their incidents, emergencies and dependencies, annexed and connexed causes whatsoever, and to proceed judicially and according to law in administering justice therein ; and moreover, to compel witnesses, in case they withdraw themselves for interest, fear, fa-

Fenn
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Bowker.

sequence no service of such a rule can legally be made on him at the Prothonotary's office at this District.

3. That such service can only be made on absentees called in by advertisement or on parties to a suit who have left Lower Canada since proceedings were commenced.

4. That even if the Plaintiff could be legally served with a Rule *sur faits et articles* at the office of the Prothonotary, the Defendant hath not complied with the requirements of the statute in such cases, not having given the necessary *prima facie* evidence of diligent search for the Plaintiff and that he could not be found.

2. That no service of said rule was made on the Plaintiff.

6. That the said rule or service thereof and proceedings thereon are altogether irregular, null and void.

By chapter 83 of the Cons. Stat., of L. C., section, 64, it is enacted, that; "if any rule emanating from the Superior Court requires to be served upon any party to any cause or instance, who has left Lower Canada since the commencement of such cause or instance, or who is not domiciled in Lower Canada, the service of such rule may be lawfully made upon such party at the office of the Prothonotary or of the Clerk of the Court in which, and at the place where such cause or instance is pending."

The judgment of the Court is as follows:

The Court, having heard the parties by their Counsel upon the motion of the Plaintiff of the 21st day of October, 1863, having examined the proceedings and deliberated, considering that the signification of the rule of this Court of the 26th day of September, 1863, for the examination of the Plaintiff upon interro-

vor or ill-will, or any other cause whatsoever, to give evidence to the truth in all and every causes above mentioned, according to the exigencies of the law, and further, to take all manner of recognizances, cautions, obligations, and stipulations, as well to our use as at the instance of any parties, for agreements or debts, or other causes and businesses whatsoever, and to put the same in execution, and to cause and command them to be executed, and duly to search and enquire of and concerning all goods of traitors, pirates, manslaughterers, felons, fugitives, and felons of themselves, and concerning the bodies of persons drowned, killed, or by any other means coming to their death in the sea, or in any ports, rivers or public streams, or creeks, and places overflowed, and also concerning what may be happening in the aforesaid places, and engines, toils, and nets prohibited and unlawful, and the occupiers thereof.

And moreover, concerning fishes royal, namely; whales, kigge, grampuses, dolphins sturgeons, and all other fishes whatsoever, which are of a great and very large bulk or fatness, by right or custom any ways used, belonging to us and to the office of our high Admiral of England; and also of and concerning all casualties at sea, goods wrecked, flotsom, jetsom, lagon, shares, things cast over board, and wreck of the sea, and all goods taken and to be taken as derelict or by chance found or to be found and all other trespasses, misdemeanors, offences, enormities and maritime crimes whatsoever done and committed, or to be done and committed, as well in and upon the high sea, as in all ports, rivers, fresh waters, and creeks, and shores of the sea, to high water mark, from all first bridges towards the sea, in and throughout our said province of Lower Canada, and maritime coasts thereof, and thereunto belonging, howsoever, whensoever, or by what means soever arising or happening. And &c., &c.

Fenn
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Bowker.

gatories *sur faits et articles*, and of the said interrogatories was insufficient, doth grant the said motion of the Plaintiff with costs against the said Defendant, and doth in consequence reject and set aside said rule and interrogatories, and doth also set aside and remove the default rendered against the said Plaintiff for his non-appearance to answer to said rule and interrogatories.

Snowdon & Gairdner, Attorneys for Plaintiff.

Motion granted.

A. & W. Robertson, Attorneys for Defendant.

(P. R. L.)

MONTREAL, 29 SEPTEMBRE, 1863.

No. 80.

Coram BERTHELOT, J.

Russell vs. Fournier et al., & McBain adjudicataire.

JUGE : Qu'une règle pour folle enchère peut être accordée, nonobstant le décès du créancier pour-
suivant le décret.

Une règle pour folle enchère ayant été émanée au nom de la Demanderesse pour procéder à la revente des immeubles adjugés à l'adjudicataire qui avait négligé de payer son prix d'adjudication, ce dernier répondit par écrit dans les termes suivants :

" L'adjudicataire George A. McBain, pour réponse à la règle prise contre lui, dit : qu'il est informé que la Demanderesse est décédée, et que de fait elle est décédée en Ecosse, depuis plus d'un an, ce qu'il offre de prouver; que les copies de la règle signifiée ne sont pas certifiées valablement ni légalement, les avocats n'ayant pas droit de certifier les dites copies, auxquelles l'adjudicataire réfère, et il conclut au rejet et débouté de la dite règle avec dépens."

Par son jugement, la Cour accorda la règle pour folle enchère.

Folle enchère ordonnée.

A. & W. Robertson, avocats de la Demanderesse.

Morau, Ouimet & Chapleau, avocats de l'adjudicataire,

(P. R. L.)

MONTREAL, 20TH SEPTEMBRE, 1863.

Coram MONK, A. J.

No. 1669.

The Unity Fire Insurance Company vs. Hickey et al.

FAITS ET ARTICLES—COSTS OF APPEARANCE.

HOLD:—That a Defendant from the country who has been summoned to Montreal to answer to interrogatories *sur faits et articles*, cannot refuse to answer until his expenses of appearance have been paid.

The Defendants were summoned by a rule of Court to appear before the Court and make answer on the 20th September instant, to certain interrogatories *sur faits et articles*, which had been previously served upon them.

They all lived out of Montreal. Nicolas Pursell, one of them whose domicile

Hoffnung
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was at St. Matthias, in the county of Rouville, appeared in Court on the day appointed and applied to have the expenses of his journey in compliance with the order of Court paid to him before he should be required to answer the interrogatories.

The Court rejected the application.

Application refused.

Cross & Bancroft, for Plaintiff.

J. M. Desjardins, for Defendants.

(P. W. T.)

MONTREAL 24 FEVRIER 1863.

Coram, Monk, J. A.

Charlebois, vs. *Coulombe*.

JUGE: Que les frais dont distraction a été demandée, dans les conclusions de la déclaration par le procureur *ad litem* du demandeur, lui seront adjugés, par jugement de la Cour, nonobstant que les parties se soient arrangées après le rapport de l'action par acte notarié et hors la connaissance du procureur du demandeur.

Cette action était une demande en adhésion portée par le demandeur contre la défenderesse sa belle-mère, chez laquelle s'était retirée la femme du demandeur.

Le demandeur avait pris les conclusions suivantes :

"C'est parce que le dit demandeur conclut à ce que la dite défenderesse soit jugée et condamnée à rendre et renvoyer au dit demandeur sa dite épouse, sous tel délai du jugement que la cour fixera, et qu'à défaut par elle de ce faire sous tel délai, le dit demandeur soit autorisé de prendre et d'aller chercher sa dite épouse chez la dite défenderesse par tous moyens que de droit et suivant le cours de la loi de plus qu'il soit fait défense et inhibition à la dite défenderesse de retirer chez elle la femme du demandeur, conclut en outre le dit demandeur à ce que la dite défenderesse soit jugée et condamnée à lui payer par forme de dommages, la somme de £1,000 et les dépens dans tous les cas, de la présente action, dont le soussigné demande distraction."

Cette action ayant été rapportée devant la cour, le 1er septembre 1862, le demandeur, par un acte de désistement reçu le 6 octobre 1862, par devant M^{re} Martin, N. P., se désista de sa demande contre la défenderesse et se chargea de payer tous les frais.

Comme le demandeur négligeait de payer les frais de cette action, son procureur inscrivit la cause à l'enquête pour prouver ce désistement, et sur audition au mérite, la cour rendit jugement pour les frais, accordant distraction au procureur du demandeur. Ce jugement est dans les termes suivants :

La cour, après avoir entendu les parties par leurs avocats sur le mérite de cette cause *ex-parte* examiné la procédure, pièce produite et preuve et avoir sur le tout délibéré, condamne la défenderesse à payer au demandeur les dépens de cette action seulement, distraits à M. D. Girouard, avocat du demandeur.

Jugement pour les frais.

D. Girouard, avocat du demandeur.

Leblanc et Cassidy, avocats de la défenderesse.

(P. R. L.)

COURT OF QUEEN'S BENCH.

APPEAL SIDE.

Hoffnung
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Porter.

MONTREAL, 3rd JUNE, 1863.

In appeal from the Superior Court, District of Montreal.

Coram AYLWIN, J., MEREDITH, J., MONDELET, A. J., BERTHELET, A. J.

ABRAHAM HOFFNUNG,

(Defendant in the Court below.)

APPELLANT.

and

ANDREW PORTER.

(Plaintiff in the Court below.)

RESPONDENT.

CAPIAS—INTERLOCUTOR—APPEAL.

Held:—That an appeal will be allowed from an interlocutor rejecting the motion of the Defendant to quash a *capias*, under which he has been arrested and is out on bail.

The Plaintiff arrested the Defendant by a Writ of *capias ad Respondendum*. After the return of the action into Court, the Defendant moved the Court to quash the *capias* on grounds set forth in his motion. The motion was rejected on the 30th April last, and the Defendant now moved the Court of Appeals to be allowed to appeal from the judgment of the 30th April.

Torrance for the Plaintiff, resisted the motion on the ground that the interlocutor complained of was of such a character as could be remedied by an appeal from the final judgment, the Defendant being out of jail on bail.

The Court granted the motion and allowed the Appeal. Motion granted.

B. Devlin, for Appellant.

Torrance & Morris, for Respondent.

(V. W. T.)

MONTREAL, 4TH SEPTEMBER, 1863.

Coram SIR L. H. LAFONTAINE, Bart, C. J., DUVAL, J., MEREDITH, J.,

MONDELET, A. J.

The same cause.

INTERLOCUTOR RESCINDED—DELAYS.

Held:—That where an Appellant obtains the leave of the Court to be allowed to appeal from an interlocutory judgment, and since the allowance of the appeal, has not further moved in the cause, and has failed and neglected to sue out a Writ of Appeal as he was bound to do in due course, the Court of Appeals will at its next term rescind and annul its order allowing the appeal.

As reported above, the Defendant on the 3rd June last was allowed to appeal from an interlocutory judgment of the Superior Court. The effect of the allowance of the Appeal was to prevent the Plaintiff from further moving in the cause in the Court below. The Defendant took no further steps on his Appeal, and in the next term of the Court of Appeals, the Plaintiff moved the Court that in consequence of the Defendant's neglect to sue out a Writ of Appeal, the order allowing the appeal should be rescinded.

The motion of the Plaintiff was granted by the following judgment:

"The Court * * * * * considering that the said Abraham Hoffnung, on the third day of June last, obtained the leave of this Court to be allowed to appeal from an interlocutory judgment rendered on the thirtieth day of April last

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and
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by the Superior Court sitting in the District of Montreal, and that since the allowance of the said appeal, he has not further moved in the said cause, and has failed and neglected to sue out a Writ of Appeal, as he was bound to do in due course, doth grant the said motion, rescind and annul the order or judgment rendered by this Court, in this cause, on the third day of June last, allowing the same Appeal, which said order or judgment is hereby set aside with costs, &c."

(F. W. T.)

Motion granted.

MONTREAL, 7th SEPTEMBER, 1863.

Coram DUVAL, J., MEREDITH, J., MONDELET, A. J., MONK, J., *ad hoc*.

No. 72.

JOHN W. HERBERT,

(Defendant in the Court below,)

APPELLANT.

AND

WM. FENNELL,

(Plaintiff in the Court below,)

RESPONDENT.

Held:—That in actions respecting moveables, each party has a right to go into the question of property.

2. That the prescription of 3 years, in cases of moveables, cannot be maintained without proof of good faith.
3. That the knowledge of a party invoking such prescription that the person from whom he claims to have acquired a moveable was not the owner thereof is evidence of bad faith.

This was an Appeal from a Judgment rendered by the Circuit Court, at Montreal, on the 30th December 1861, maintaining a *saisie revendication*, at the instance of the Respondent, of a violin which the Appellant had borrowed from the Respondent but which the former refused to return, on the ground that it was his property.

The Judgment appealed from was:—

"La Cour, après avoir entendu les parties par leurs avocats sur le mérite de cette cause, examiné la procédure et le témoignage, et avoir sur le tout mûrement délibéré, considérant que le défendeur ne détient le violon mentionné en la déclaration et revendiqué sur lui qu'à titre de précaire et du demandeur pour l'avoir eu à titre de prêt ou à l'essai, vu que le défendeur en avait perdu toute possession à titre de propriétaire depuis plus de trois ans, avant qu'il soit devenu de nouveau en ses mains à titre précaire comme susdit: Considérant enfin qu'au jour de l'institution de cette action et avant qu'il fut venu aux mains du défendeur au titre susdit,—le demandeur était alors propriétaire en possession pour l'avoir acheté de William Leonard, qui en était alors en possession; déclare la Saisie Revendication faite en cette cause bonne et valable, et condamne le défendeur à remettre le violon saisi, sous quinze jours, à compter de la signification de ce Jugement, sinon à payer la somme de cinq livres courant, pour la

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Devlin, for appellant:—In the month of July, 1861, the Respondent instituted the action in which the Judgment appealed from was rendered. The object of the action was to obtain from the Appellant the possession of a violin which Respondent in his declaration alleged was his property, and which he further stated was illegally detained by the Appellant,—he also set forth that this violin was of the value of £25, and concluded by asking for a writ of *Saisie Revendication*, under and by virtue of which the violin was seized in the hands of the Appellant.

To this action the Appellant pleaded that the Respondent was not the proprietor of the violin so seized; that, on the contrary, it was, his, the Appellant's property, and was surreptitiously taken from his son, to whose care and custody it had been temporarily entrusted whilst on his way from Quebec to Montreal by Railroad. A *défense au fonds en fait* was also pleaded.

Respondent, by his answer to Appellant's first plea, alleged that he became the proprietor of the violin by purchase from one William Leonard, and that before the institution of his action, the Appellant's son borrowed it, and afterwards refused to give it up. To the *défense au fonds en fait* he filed a replication.

The Respondent examined four witnesses in support of his action. The Appellant none, and for this reason, that the allegations contained in his pleas were abundantly proven by Respondent's witnesses.

The evidence so adduced establishes these facts:—Firstly, that George Herbert, a minor son of Appellant's had, in the year 1856, a musical engagement in Quebec. That he accordingly went there from Montreal, taking with him his favorite violin, the one in question, to which he attached great value. That upon his return home he travelled by the Grand Trunk Railway, and upon his arrival at Longueuil, opposite Montreal, occupied himself in seeing his baggage transferred from the cars to the Ferry Boat, which was then in 1856, used and employed by the Grand Trunk Co. to take their passengers arriving by the cars to Montreal. That immediately after seeing his baggage deposited on this Ferry Boat, he returned to the cars for his violin which was carefully locked up in a case, but found that it had been taken away from the place in which he had left it. Thereupon he searched for it diligently but to no purpose. Upon his arrival home, he informed Appellant of the fact, that his violin was stolen, and he immediately communicated the circumstance to the Agents of the Company, who upon their part promised to use every effort for its recovery. But notwithstanding that careful enquiries were made for this purpose, no trace of the violin could be found, and so it remained until a short time before its seizure by respondent it was brought to the Appellant's shop for the purpose of ascertaining its value, where it was at once recognized by the Appellant's said son as the same violin which had been stolen from him on his way from Quebec to Montreal. The Appellant not knowing what his rights were, under the circumstances, allowed it to be taken away. But being in a short time afterwards given to Appellant's son by the Respondent's brother, it was retained by Appellant.

It is also incontestably proved that this violin was taken, or, in other words

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stolen, by one William Leonard, who subsequently sold it to the Respondent, the latter well knowing at the time he so purchased it, in what way Leonard became possessed of it. This man Leonard was, at the time of the theft, an engineer on board the Grand Trunk Ferry Boat, plying between Longueuil and Montreal. And it is worthy of remark that, according to his own admissions, sworn to by himself, it was on board this same boat and whilst he was so employed as engineer, that he fraudulently carried off the violin, secreted it and appropriated it to his own use.

These are the principal facts as they came out in the evidence adduced by Respondent, and from them flow the question of Law, which has been so far decided by the Judgment hereinbefore given, and adverse to the Appellant's pretensions. It now, however, remains for this Honorable Court to determine whether or not the Law has been correctly laid down in the Judgment thus rendered.

The Appellant upon his part respectfully submits, that with a correct application of the Law to the facts proved, the Judgment is not sustainable.

Firstly, because the prescription of three years, upon which the Judgment was evidently predicated, could not, under the circumstances detailed in evidence, be invoked to favor the possession set up by the Respondent. For it must be borne in mind, that Leonard's possession of the violin can only be regarded as the possession of a thief, a fact too well known to the Respondent, before and at the time he purchased this instrument through the agency of his friend Gethings, who was also examined as his witness.

Can it therefore be said that Leonard possessed the violin in good faith for three years? True it is, that he had it in his possession for a much longer period of time; but, he so had it, by a felonious taking in the first instance, and surely his subsequent retention of it unknown to the Appellant, ought not to operate in his favor, a title founded upon a prescription which requires a possession of three years in good faith and one untainted by theft.

If, therefore, Leonard's possession of the violin did not constitute him the proprietor of it, it follows as a matter of course, that his sale of it to the Respondent gave him no title whatever, to or over it. For Leonard having no right in the violin, could transfer none. *Nemo plus Juris in alium transferre potest quam ipse habet.* The Respondent had possession of it about six months before the institution of his action, having acquired the violin in the way already mentioned, and he of course cannot invoke three years prescription.

The Appellant, under all the circumstances, most respectfully submits that the Judgment appealed from, is utterly unwarranted and illegal, at variance with law and evidence, and humbly prays that it may be reversed.

Loranger, for Respondent:—

Le Jugement dont est appel fut rendu par la Cour de Circuit, à Montréal, maintenant la saisie revendication d'un Violon, la propriété de l'Intimé revendiqué entre les mains de l'Appellant. L'Appellant avait plaidé que ce Violon était sa propriété, et qu'il avait été perdu en 1856 par son fils mineur dans un voyage entre Québec et Montréal, dans les wagons de chemin de fer.

Quatre témoins ont prouvé la propriété de l'Intimé qui avait acheté ce Violon

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d'un nommé Léonard, employé de la Compagnie du Grand Tronc, il y a à-peu près un an, et pour trois dollars.

Que l'Intimé l'avait porté chez l'Appelant et l'avait présenté au fils du Défendeur pour l'examiner ou l'évaluer, il y a quelques mois, et que Herbert fils, ne l'avait pas alors réclamé.

Depuis, Herbert fils, en compagnie du nommé Prince, musicien, est allé emprunter le Violon en s'adressant au frère de l'Intimé qui le lui a laissé emporter à l'essai et pour l'examiner, jusqu'au lendemain. Le lendemain, le frère de l'Intimé s'étant présenté chez Herbert, fut remis au surlendemain, et enfin Herbert lui a écrit que le Violon était celui qu'il avait perdu en 1856, et que l'ayant retrouvé, il le gardait comme sa propriété.

Une chose est constante :

En 1861, il était la propriété et en la possession de l'Intimé pour l'avoir acheté d'un tiers, et qu'il ne s'en est dessaisi ou en a perdu la possession qu'en le remettant à l'ancien propriétaire qu'a titre de prêt ou à l'essai, enfin à titre de *précaire*.

Sur la prescription en fait de meubles, l'on peut citer : Pothier, Vol. 4, Prescription No. 204, 205.

"La disposition du droit romain qui ne permet pas qu'un possesseur de bonne foi puisse acquérir par la prescription, les *choses furtives*, me paraît être un droit purement arbitraire, et je ne vois rien dans ces principes du droit naturel qui doive empêcher le possesseur de bonne foi d'une chose furtive, de l'acquérir par la prescription. C'est pourquoi dans le Pays Droit Romain n'a pas par lui-même force de loi, mais seulement en tant qu'il paraît pris dans le droit naturel, je doute très-fort que cette disposition du droit pour les *choses furtives* y doive être observée."

Nonobstant cette opinion de Pothier, on trouve dans Denisart, 3 Vol. Verbo Prescription p. 730 ce qui suit :

"La Coutume de Paris n'a point de règle, et je n'en connais point qui fixe le temps pendant lequel il faut posséder des meubles pour acquérir la propriété. Nous tenons au Châtelet pour maxime certaine : Que celui que est en possession de meubles, bijoux, et argent comptant, en est réputé propriétaire *s'il n'y a titre au contraire*. Ferron sur Bordeaux, agite cette question de la prescription des meubles et rapport différentes opinions sur la prescription des meubles."

La Peyrère.—"Lettre P. No. 98, n'est point d'avis que la prescription des meubles ait lieu par trois ans, et son apostilleur dit qu'il faut trente ans pour prescrire les meubles et les immeubles."

Ce que, dit Denisart, qu'en fait de meubles, la possession vaut titre, au titre de la prescription relativement aux meubles, est aussi adopté par Bourjon, Tome 1, Tit. 22, p. 1094.

Bourjon No. 1.—"La prescription n'est d'aucune considération quant aux meubles, puisque la simple possession d'eux produit tout l'effet d'un titre parfait; principe qui applanit les difficultés, que le silence que la coutume de Paris a gardé sur cette prescription, faisait naître.

"Quelques-uns ont prétendu qu'il fallait une prescription de 30 ans; mais cela n'était pas raisonnable puisque pour les immeubles avec titre et bonne foi

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elle ne requiert que 10 ans; inconvénient qui avait conduit d'autres à dire que conformément aux Institutes L 2 Tit. 6, il fallait une possession de 3 ans. Les contradictions cessant par le principe qu'on vient de poser, il est étrange qu'on ait tenté de s'en écarter. Suivant la Jurisprudence du Châtelet, la possession d'un meuble ne fut-ce qu'un seul jour vaut titre de propriété, sauf le cas de vol."

No. 2.—"La chose furtive peut être revendiquée partout où on la trouve, c'est la seule exception qu'on puisse apporter à la règle ci-dessus posée : qu'en matière de meubles la prescription vaut titre."

No. 3.—"Pour donner ouverture à ce droit de suite et revendication, il faut que le vol soit juridiquement constaté par une plainte d'information, ou autrement il y aurait fin de non-recevoir dans la demande ou revendication et dans ce même cas, la possession déciderait toujours, ce qui confirme ce que dessus."

L'on voit par ce que dessus en quels cas la maxime que "*la possession vaut titre*," invoquée par l'Appelant, lors de l'argument, peut et doit être admise, ce n'est certainement pas dans le cas présent. L'Intimé ayant acheté de bonne foi le Violon en question, et l'Appelant n'en étant devenu en dernier lieu en possession, non pas *animo Domini* comme maître ou propriétaire, mais seulement comme emprunteur ou pour l'essayer.

Mais voyons ce que rapporte maintenant Troplong V.2, Prescription sur les deux articles du Code Napoléon sur cette matière :

10. Art. 2279.

"En fait de meubles la possession vaut titre."

"Néanmoins celui qui a perdu ou auquel il a été volé une chose peut la revendiquer pendant trois ans, à compter du jour de la perte ou du vol contre celui dans les mains duquel il l'a trouvée, sauf à celui-ci son recours contre celui duquel il la tient."

Le Code a innové à l'ancien droit en introduisant la prescription de 3 ans, hors le cas de *perte* et de *vol*; art. 2280 : "Si le possesseur actuel de la chose volée ou perdue l'a achetée dans une foire ou marché, ou dans une vente publique, ou d'un marchand vendant de pareilles choses, le propriétaire originaire ne peut se la faire rendre qu'en remboursant au possesseur le prix qu'elle lui a coûté."

Après avoir commenté au long sur ces deux articles, il se résume ainsi au No. 1041 : Sous l'ancien droit il y avait trois systèmes :

10. Le premier, qu'on devait appliquer aux meubles les mêmes principes et les mêmes délais de prescription qu'aux immeubles.

20. Le second, qui, suivant le droit romain, finirait à trois ans, le temps de la prescription des meubles.

30. Le troisième enfin, qui pour mettre tout le monde d'accord, n'exigeait aucune prescription et donnait à l'occupation tout l'effet de la propriété, à moins que la chose n'eût été volée. Le dernier était adopté par Boujon et autres au Châtelet.

No. 1044.—Lorsque l'Intimé agit en vertu d'un titre ou d'une convention avec celui qui possède, son droit pour réclamer le meuble ne se prescrit que par

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le délai ordinaire voulu pour prescrire l'action résultant de la convention. V. G. Je vous donne un meuble à titre de *dépôt ou de prêt*. Votre possession qui n'est qu'une possession provisoire, n'a aucune vertu en présence du titre que je lui oppose. Je la réduis à sa juste valeur en faisant paraître votre obligation, et ce n'est pas ici qu'est appliquée la maxime: "*En fait de meubles la possession vaut titre*." Ou, du moins, la possession est indice de la propriété d'un meuble ou d'un immeuble, ce n'est qu'en autant qu'on ne montre pas un *titre contraire* qui prouve que vous, possesseur, vous ne tenez que de moi votre détention. En appliquant ces principes à la cause actuelle, il faut dire :

1o. Que l'Appelant ne détenant le violon en question qu'à titre de précaire de l'Intimé en vertu d'un contrat ou prêt, ne peut lui opposer que "*la possession vaut titre*."

2o. Qu'au jour de l'institution de l'action, l'Intimé en était propriétaire en possession, *animo domini* pour l'avoir acheté de Léonard.

De ce que ci-dessus exposé, il résulte que la saisie-revendication était bien dirigée contre l'Appelant, que par le Jugement dont est appel et dont l'Intimé demande la confirmation, il a été condamné à restituer le Violon en question ou à en payer la valeur estimée à £5 0 0.

MERDITH, J.:—The controversy between the parties is as to the ownership of a violin, of no great pecuniary value; but notwithstanding this, the question of law which the case presents, is of importance.

It appears that about five years before the institution of the action in the Court below, the Appellant's son, George W. Herbert, then a minor, being a passenger from Quebec to Montreal, by the Grand Trunk Railway, lost the violin in question. It was found on the deck of the Grand Trunk Ferry Boat, by the second Engineer, one Leonard. This person ought, of course, to have handed the violin to the proper officer of the Grand Trunk Company; but he did not do so. On the contrary, after, as he says, telling the Engineer of the boat, and the working men, that he had found the violin, he kept it for some time in his berth on board the boat, then took it to his lodging house on shore, broke open the case, took the violin, and used it as his own; and afterwards sold it to the Respondent who, at the time, was perfectly aware of the manner in which his vendor had obtained possession of it.

In order to prevent any doubt as to this important point, I may observe that Leonard, being examined for the Respondent, in his cross examination, says:—

"The Plaintiff and Gettings (who purchased the violin for him) were both aware of the fact that I found the fiddle as I have mentioned." and James Fennel the brother of the Plaintiff says "my brother the Plaintiff and Gettings "knew" that this violin had been found on the Grand Trunk Ferry Boat," and Gettings, who purchased the violin for the Plaintiff, says also that Leonard told him "he had found the violin on board the boat."

It seems to be thought by the Respondent that, under the circumstances just mentioned, some description of prescription can be urged against the Appellant, but such is not the case. Assuming for the purpose of the present discussion, that, under our law, there is a prescription of three years as to moveables, the respondent cannot derive any advantage from that prescription, as it certainly

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requires good faith. Dunod, page 150, says "Les meubles se prescrivent par trois ans avec titre et bonne foi;" and Pothier prescription No 205, says "il faut pour cette prescription que le possesseur justifie d'un juste titre d'ou sa possession précède, et qu'elle soit de bonne foi." Under the modern law of France, also, (2) it is quite certain that for the prescription of movables, by any period less than three years, *good faith is required*.

As to the question of good faith, with reference to the case before us, it is plain there was nothing of the kind on the part of the finder Leonard; indeed his conduct was not consistent with common honesty. His duty was to take the violin to the officer of the Grand Trunk Company, empowered to take charge of such things; and he admits, that about a week after he found the instrument, that being about three weeks before he broke open the case, he knew that such was his duty. And there can be but little doubt that had he done, what he knew he ought to have done, the Appellant would have found his property.

As to the possession of the Respondent, who bought the violin from Leonard, knowing that he was not the owner of it, it is sufficient to observe that his possession lasted but a few months; and therefore, cannot by itself be of any advantage to him as supporting a plea of prescription.

I hold it, therefore, to be certain that the respondent at the time of the institution of the proceedings in the Court below, had not acquired a right of property in the violin in question; and on the contrary that the Appellant then remained as perfectly owner of it, as he was the day his son lost it.

Up to this point I believe there cannot be any difficulty, but a question has been raised as to whether, considering the mode by which the Appellant obtained possession of the violin, we ought by our judgment, to allow him to retain that possession.

The facts as to this part of the case are to be found in the evidence of George W. Herbert, the son of the Appellants. This witness says:—

"Mr. McCulloch brought this violin to me to ask me my opinion about it. I looked at the violin, and recognized it as being my property and I returned it to Mr. McCulloch. Some weeks after, I saw the same violin in the possession of the Plaintiff's brother James Fennell. I went to see James Fennell with a Mr. Maffre, at the request of the latter. I saw the violin there in the possession of James Fennell. The said James Fennell offered me the violin to take to my house to try. I brought the violin with me at my place. James Fennell told me that this violin was his brother's property. Mr. Fennell called for the violin. I told him I had not examined the violin yet that I would see to it next day.

Question.—On that occasion did you not say to James Fennell that you would send him down the violin the next day?

Answer.—I don't remember saying that at all. I don't know if Mr. Fennell came for the violin twice. I wrote to Mr. James Fennell the very next day after as I think Fennell called for the violin, informing him that I had taken a legal advice that the violin was mine, and I would retain it; I said that the violin was mine and I had lost it some years previous."

(2) Troplong Prescription No. 1043, Vol. 8, page 656. Marcadé prescription p. 247.

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It is said that the evidence of this witness shows that the Appellant obtained possession of the violin by a trick; and therefore that he ought to be compelled to reinstate the Respondent in possession, irrespective of any question as to who is the owner.

In order to maintain this pretension, even if it were founded in fact, it seems to me we would have to treat this action as if it were an action *en réintégrande* for the recovery of the possession of real estate; whereas we know that there cannot be an action in complaint or *en réintégrande* as regards a chattel (1.)

It is not necessary as regards the present controversy to express an opinion as to whether there may not be cases in which the possession of moveables might be recovered irrespective of the question of property. For the decision of the present case it is sufficient to observe that the general rule is that in actions respecting movables, each party has a right to go into the question of property — From that rule in the present case:

Pothier says: "Notre droit Français est en cela différent du droit Romain qui accordait une action possessoire appelée *Interdictum utrubi* à ceux qui sont troublés dans la possession d'une chose mobilière — Mais dans notre Droit Français lorsque deux parties se disputent une chose mobilière, on entre d'abord dans la question de propriété" (2) and Rodier in his commentary on the Ordinance of 1667, after saying that an action *en complainte et en réintégrande* may be maintained as to an *Universalité de meubles*, says: "*mais pour un meuble en particulier, on doit procéder par autre action comme maître et propriétaire d'icelui*" savoir par action criminelle pour fait de vol."*

Such I repeat, is the general rule; and in the present case, in which the Plaintiff purchased from a person whom he knew was not the owner of the thing sold, and in which there has been no violence on the part of the Defendant, I see no reason for a departure from the general rule as laid down by Pothier.

There is however, one consideration which appears to me very important if not conclusive as to this part of the case. It is that the parties by their pleadings have directly raised the question as to the ownership of the violin. And as that question has been so raised; and as according to my view, the right of ownership is, beyond doubt, in the Appellant, it seems to me impossible for us, without changing, as it were, the nature of the demand, to award the violin to the party whom, we say, is not the owner of it.

There remains one other point which I desire to notice, it is the pretension that the violin, if it belong to either of the Herberts, belongs to George Herbert and not to his father the Appellant. George Herbert in his examination in Chief speaks of the violin as being his, but in his cross examination he explains his meaning, and says;

I was a minor at the time I lost the said violin and under the care of my father. When I say the violin was my property at the time, I mean of course

(1.) Custom of Paris Art No. 79, Serpillon p. 274. Guyot's Rép. Vol. 4, p. 292. — Verbo Complainte, Pigeau Vol. 2, page 131. Nouveau Denisart Vol. 5, p. 21. Verbo complainte. Curasson, des actions possessoires, page 142. Garnier action poss., p. 192 and 194.

(2) Pothier Traité de la possession No. 93 See exception to the general rule Pothier's possession 108.

* Rodier Com. on Ord. 1667. p. 315.

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that I had the charge and keeping of it, but the property was in my father. I now look upon it as mine since I have attained the age of twenty-one years for the reason that it was originally bought for me.

And towards the close of his evidence he says: "the price paid is marked upon it, although almost invisible, being the very same mark upon it when I lost it." The price marked upon the said violin is \$20, *which was the amount paid for it by my father.* We are to judge of the case by the facts proved, and not by the impression of the witness. As to a matter of law, and according to the facts proved the Appellant, and not the witness, his son, is the owner of the violin in question.

For these reasons it seems to me that the Judgment of the Superior Court, awarding the violin to the Respondent, who, according to the views of the majority of the Court has no right to it cannot be maintained.

The following was the judgment of the Court:—

The Court, * * * considering therefore that the said sale of the said violin could not give a right of ownership in it to the Respondent, who knew at the time of the said sale, that the person selling the said violin not only was not the owner of it, but, on the contrary, had obtained possession of it wrongfully, and retained possession of it dishonestly.

Considering also that at the time of the institution of the action in the Court below, the Respondent had not acquired any right to the said violin by prescription; the possession by the said Leonard of the said violin, having been in bad faith; and the possession of the Respondent, (irrespective of any question as to bad faith on his part) having existed for too short a time to serve as a basis for a plea of prescription; and therefore, that the right of property of the appellant, in the said violin, was as perfect at the time of the institution of the action in the Court below, as it was at the time the said violin was so lost by the said minor son of the appellant.

And considering that the fact of the said violin having been borrowed by the son of the appellant from the respondent, a short time before the institution of the action in the Court below, cannot give the respondent a right to claim, as belonging to him, as he does by his declaration in this cause, the said violin which does not belong to him, as he must be aware, he having purchased it from the said Leonard under the circumstances aforesaid; and considering therefore that in the judgment of the Court below which condemns the appellant to deliver up the said violin to the said respondent, there is error, this Court doth in consequence reverse the said judgment, to wit, the judgment rendered by the Superior Court at Montreal, on the thirtieth day of December, one thousand eight hundred and sixty-one, and proceeding to render the judgment which the Court below ought to have rendered in the premises, doth dismiss the said action of the said respondent against the said appellant, and doth condemn the respondent to pay the appellant his costs as well in the Court below as in this Court. (The Honorable Mr. Justice Duval dissenting); and lastly it is ordered that the record be remitted to the Court below.

B. Devlin, for Appellant,

Judgment of Court below reversed.

Loranger & Frères for Respondent.

(S. B.)

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MONTREAL, 1ST SEPTEMBER, 1862.

In Appeal, from the Court of Queen's Bench, Crown side.

Coram Sir L. H. LAFONTAINE, BART., C. J., DUVAL, J., MEREDITH J., MON-
DELET, A. J.Our Sovereign
Lady the Queen
vs.
W. McGinnis.*Our Sovereign Lady the Queen vs. William McGinnis.*

INDICTMENT—STEALING COPY OF NOTARIAL MINUTE.

Held:—That the Statute of Canada, Cap. 92; Sec. 26 does not make it an offence to steal an authentic copy of an *acte* or deed passed before a notary.

The following case was reserved by the Court of Queen's Bench Crown side for the decision of the same Court in appeal:

The Defendant William McGinnis was indicted under Section 26, chap. 92; of the Consolidated Statutes of Canada, and tried before me during the March Term of the Court of Queen's Bench on the Crown side, at the city of Montreal.

The following is a true copy of the indictment containing two counts to which he pleaded not guilty.

1st count, "The Jurors for our Lady the Queen upon their oath present that *William McGinnis*, late of the city of Montreal, in the District of Montreal, labourer, on the eighth day of May in the year of our Lord one thousand eight hundred and sixty, at the city aforesaid in the District aforesaid; a certain original document, to wit, an *acte or deed of transfer* made and passed before one Louis Barbeau and another, public notaries, and dated the seventeenth day of November in the year of our Lord, one thousand eight hundred and fifty-four, and executed by one Toussaint Duolos to and in favor of one Jean Baptiste Varin, and relating to a certain civil suit then depending in a Court of Justice; to wit, in the Superior Court for Lower Canada, at the city of Montreal aforesaid, then and there unlawfully did steal, take and carry away against the form of the Statute in such case made and provided, and against the peace of our Lady the Queen, Her Crown and dignity.

"2nd count, And the Jurors aforesaid upon their oath aforesaid, do further present, that the said *William McGinnis*, on the eight day of May in the year of our Lord one thousand eight hundred and sixty, at the city aforesaid in the District aforesaid, a certain notarial minute, to wit, an *authentic copy of an acte or deed of transfer* made and passed before one Louis Barbeau and another, public notaries, and dated the seventeenth day of November, in the year of our Lord one thousand eight hundred and fifty-four, and executed by one Toussaint Duolos to and in favor of one Jean Baptiste Varin and relating to a certain civil suit then depending in a Court of Justice, to wit: in the Superior Court for Lower Canada, at the city of Montreal aforesaid, in the District aforesaid, then and unlawfully did steal, take and carry away, against the form of the Statute in such case made and provided, and against the peace of our Lady the Queen her Crown and Dignity."

On the tenth day of April 1862, the trial of the Defendant took place upon the said indictment, and a verdict of guilty was rendered by the Jury and recorded.

Our Sovereign
Lady the Queen
vs.
W. McGinnis

The prisoner's counsel before addressing the Jury on the defence submitted that there was no case to go to the Jury, and that I should direct them to acquit the Defendant for the following reasons:

1st. That as respects the first count charging the stealing of "*a certain original document, to wit an acte or deed of transfer made and passed before one Louis Barbeau and another, public notaries*," there was no evidence whatever to sustain that count, but on the contrary, the evidence disproved that charge, it appearing from the testimony that the document referred to as filed in the cause, was a copy and not an original document.

2dly. That as respects the second count, it was unsustainable, for although it made use of the words "*a certain notarial minute*," it proceeds to describe the instrument as follows to wit, an authentic *copy* of an acte or deed of transfer made and passed before one Louis Barbeau and another, public notaries;" and that our Statute did not make it an offence to steal an *authentic copy*, as indicated by its use of the words "*any notarial minute or the original of any other authentic acte*."

The evidence bearing on the case consisted of the examination of the Prothonotary, one of his clerks, the production of the record, and establishing that the document stolen was a notarial copy, described in the list of exhibits as follows: Exhibit No. 2. "*Copie d'un acte de transport par le dit Duclos au Demandeur regu aux dits jour et lieu par les dits notaires*."

After hearing the prisoner's counsel and F. G. Johnson, Esquire, Queen's Counsel on behalf of the Crown, I directed the counsel for the prisoner to proceed with his defence, although I entertained a very strong opinion that his objections were well founded, and that the Defendant should be discharged. Nevertheless I reserved the objections for the consideration of the Court of Queen's Bench in appeal on the crown side, the question being one of importance and arising probably for the first time. The verdict was taken subject to such reservation, and the Defendant having been convicted, was ordered to give bail for his appearance at the Court of Queen's Bench appeal side on the first day of June next, and also at the Court of Queen's Bench on the Crown side, on the twenty-fourth day of September next himself in one hundred pounds and two sureties in fifty pounds each. The Defendant entered into the required security and was released from custody. (Signed.) CHARLES MONDELET, J.

Montreal, 19th April, 1862.

Upon a reference by the Court in appeal of date the 4th June, 1862, to the Court below, the following addition was made to the case reserved:

"It was also proved at the trial that the original minute of the document stolen had, previous to the time of the commission of the larceny charged in the indictment, been destroyed by a fire which consumed the premises of Barbeau, the Notary, and that the prisoner was aware that the said minute had been destroyed."

The following was the judgment on the reference:

"After hearing Counsel as well on behalf of William McGinnis as for the Crown, and due deliberation had on the case transmitted to this Court from the Court of Queen's Bench, sitting on the Crown side at Montreal, it is considered

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"and adjudged by the Court, now here, pursuant to the Statute in that behalf, *Our Sovereign*
 "that judgment of the Court upon the conviction of the said William McGinnis, *Lady the Queen*
 "be arrested and the said William McGinnis discharged from custody." *W. McGinnis*

Judgment arrested.*

F. G. Johnson, Q. C., for Crown.

W. H. Kerr, for Defendant.

(*F. W. T.*)

COUR DU BANC DE LA REINE.

MONTREAL, 19 NOVEMBRE, 1863.

EN APPEL DE LA COUR SUPERIEURE, DISTRICT DE MONTREAL.

Coram SIR L. H. LAFONTAINE, Bart., C. J., DUVAL, J. MEREDITH, J., MONDELET, J. A.

DAME CHARLOTTE M. PERRAULT & VIE.,

(*Intervenants en Cour Inférieure.*)

APPELANTS.

ET

THE ONTARIO BANK,

(*Demanderesse contestant l'intervention en Cour Inférieure.*)

ACCEPTION PAR LE CREANCIER—PREUVE.

Le 3 novembre 1859, E. B. transporta une somme d'argent qui lui était due par John Platt, à l'intervenante qui ne fut pas partie à l'acte de transport, mais pour laquelle, le Notaire recevant l'acte, a fait une acception dans l'acte lui-même. Le 4 novembre, le transport fut signifié à la personne du débiteur par le même Notaire au nom de l'intervenante. Le Cour d'Appel, infirmant le jugement de la Cour Inférieure, jugea que la signification faite par le notaire du transport, fut par le 27me section du chapitre 78 des Statuts révisés du Bas Canada, une ratification suffisante par l'intervenante de l'acceptation du transport pour elle faite par le notaire.

Le présent appel fut porté d'un jugement rendu le vingt six Décembre mil huit cent soixante, déboutant les Appelants de la demande qu'ils faisaient, qu'il leur fut permis d'intervenir dans une cause où l'intimée Demanderesse en Cour Inférieure et contestant la dite Intervention avait obtenu jugement contre le nommé Edmund Barnard et fait saisir entre les mains de John Boston, Ecuier, Shérif du District de Montréal et John Platt, Ecuier, avocat, une somme de quatre cent quatorze livres, sept chelins et sept deniers courant comme appartenant au dit Edmund Barnard; la dit somme étant le produit d'une saisie de cer-

* Consolidated Statutes of Canada, Chap. 92, Sec. 26 says:

"Any person who steals or for any fraudulent purpose takes from its place of deposit for the time being, or from any person having the lawful custody thereof, or unlawfully and maliciously obliterates injures, or destroys any record, writ, return, penal process, interrogatory, deposition, affidavit, rule, order, or, warrant of attorney, or any original document whatsoever, of or belonging to any Court of Justice, or relating to any matter civil or criminal, begun depending, or terminated in any such court, or any bill, answer, interrogatory, deposition, affidavit, order or decree, or any original document whatsoever, of or belonging to any Court, or relating to any cause, or matter begun, depending, or terminated in any such Court, or any notarial minute, or the original of any other authentic act, shall be guilty of a misdemeanor, and shall be liable to any punishment which the Court may award as in the twenty-third section hereinbefore mentioned.

45 Vic., C., 25, s. 25.

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ains Immeubles du dit John Platt en vertu d'un jugement obtenu contre le dit John Platt par le dit Edmund Barnard.

Par leur requête en intervention les Intervenants alléguaient que le dit Edmund Barnard étant endetté en une somme de \$1,125 avec intérêt du 2 Novembre 1859, envers Dame Charlotte Mathilde Perrault, l'Appelante, lui aurait comme sûreté collatérale, transporté le 2 Novembre 1859, par acte reçu devant Mtre J. S. Hunter et confrère, Notaires, un montant égal à lui dû par le dit John Platt "sur et en vertu d'un jugement rendu pour une plus grande somme" par la Cour Inférieure le 30 Juin 1859, dans une cause sous le numéro 493, "dans laquelle le dit Edmund Barnard était Demandeur et le dit John Platt, "défendeur, lequel transport fut dûment signifié au dit John Platt le 4e "Novembre 1859, par le ministère des dit Mtre. J. S. Hunter et son collègue, Notaires publics, qui ont délivré copie authentique du dit acte de transport au dit John Platt parlant à lui-même en personne."

Que ce jugement du 30 Juin 1859 avait été enregistré le 6 Juillet 1859.

Qu'à cette époque le dit John Platt était en possession des Immeubles saisis sur lui en vertu du dit jugement, et que conséquemment le dit Edmund Barnard avait une hypothèque sur ces biens pour le montant du dit jugement, en partie transporté à la dite Dame C. M. Perrault, savoir jusqu'à concurrence de \$1,125, avec intérêt du 2 Novembre 1859 et que la dit Dame C. M. Perrault avait pour cette somme le même droit d'hypothèque que le dit Edmund Barnard.

Que sur l'exécution du dit jugement en partie transporté à la dite Dame C. M. Perrault dans la cause No. 493, les Intervenants avaient filé entre les mains du Shérif du district de Montréal une opposition à la délivrance des deniers à provenir de la vente des propriétés saisies ou à saisir en la dite cause, mais que le dit John Platt aurait payé avant la vente entre les mains du Shérif le montant entier du dit jugement: sans tenir compte du transport, et de la signification qui lui en avait été faite; que "l'Ontario Bank" Demanderesse en Cour Inférieure, et la présente Intimée ayant fait saisir et arrêter la dite somme entre les mains du Shérif et du dit John Platt, comme appartenant toute entière au dit Edmund Barnard, les Intervenants en Cour Inférieure, les présents Appelants étaient bien fondés à demander que telle Saisie-Arret fut déclarée nulle quant à la somme qui leur avait été transportée qui n'appartenait pas à Barnard, et ils concluaient en conséquence à ce que la Saisie-Arret fut déclarée nulle quant à la somme ainsi transportée, et que le paiement fait par le dit John Platt de la partie du dit jugement savoir \$1050.85, balance qui leur restait due, fut déclaré avoir été fait au profit des dites Intervenants, et que le Shérif sans égard à la Saisie-Arret, fut tenu de verser entre leur mains la dite somme de \$1050.85.

L'Intimée, contestant l'intervention, alléguait dans sa contestation que John Platt, Tiers-Saisi sur le jugement obtenu par l'"Ontario Bank" n'avait pas admis dans sa déclaration, devoir au dit E. Barnard le montant du jugement transporté par lui à la dit Dame C. M. Perrault, mais seulement une somme de \$372.10½, courue avec intérêt du 30 Mars 1859, et ce suivant un jugement rendu, dans une cause No. 2383, le 23 Nov. 1859, en faveur du dit E. Barnard.

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L'Intimée admettait le paiement fait par J. Platt avant la vente des immeubles saisis; et que le Shérif avait bien déclaré en disant qu'il avait entre ses mains une somme de £414.7.7. en vertu d'un bref d'exécution de *Terris émané* à la poursuite du dit Edmund Barnard contre les immeubles du dit Platt, mais que lors de la saisie pratiquée entre ses mains le dit Shérif n'avait pas eu de signification du transport susdit, et par conséquent devait considérer le paiement de £414.7.7. fait par Platt, comme fait en faveur du dit E. Barnard et devait lui payer cette somme, et que la saisie fait entre les mains du Shérif était une saisie de deniers dûs à Barnard—et l'intimée concluait par demander le débouté de l'intervention.

Les Appelants firent à cette contestation une réponse générale.

Il est constaté par le dossier que le montant payé par Platt le fut sur le jugement transporté en partie aux Appelants par Edmund Barnard après exécution émanée; et ce fut après ce paiement ainsi fait entre les mains du Shérif chargé de l'exécution, que fut émanée la saisie-arrest par l'Intimée sur laquelle saisissement les Appelants se prétendant seuls créanciers du jugement en vertu du transport, crurent devoir intervenir pour réclamer l'argent qui leur appartenait exclusivement, si le jugement leur avait été effectivement transporté.

Le jugement rendu sur cette contestation le 26 Décembre 1860 est dans les termes suivants :—SMITH J.

"The Court having heard the intervening parties, and the plaintiff contesting upon the merits of the Intervention made and filed in this cause by the said Intervening parties, examined the proceedings and proof of record and deliberated:

"Considering that the said Dame Charlotte Mathilde Perrault, the intervening party in this cause, hath failed to establish any right in law to intervene in this cause and thereby to have and maintain the conclusions by her taken in said intervention and to claim by preference the money seized by process of *Saisie-Arret* in the hands of John Boston, Esquire, to the exclusion of the said Plaintiff in this cause, and for the reason that the said Dame Casgrain hath failed to show any legal binding and subsisting agreement between her and the said Edmund Barnard her said assignor, the said assignment of the said judgment obtained by the said Edmund Barnard against the said John Platt not being accepted by the said Dame Casgrain in any way or form to make the said assignment binding, and that by reason thereof the said assignment cannot vest the said Judgment in her the said intervening party as claimed by her; the Court doth maintain the contestation of the said intervention by the said Plaintiff, and doth dismiss the same with costs...."

La Cour d'Appel a renversé ce jugement:

LAFONTAINE, C. J.—Le 28 Fev. 1859, à Montréal, La Banque d'Ontario obtient un Jugement contre Edmund Barnard et Olivier Berthelet, pour la somme de \$3602, avec intérêt sur \$3600, à compter du 11 Sept. 1858, et les dépens taxés à £18 18 9 courant.

Le 2 Nov. 1859 (Hunter, Notaire) acte d'obligation par lequel Barnard reconnaît devoir à la dite Dame Charlotte Mathilde Perrault la somme \$1125, payable à demande, et lui cède et transporte, comme sureté collatérale, un mon-

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tant égal dû au dit Barnard par John Platt, sur jugement pour plus forte somme, rendu le 30 Juin 1859, dans une cause No. 493, de Barnard contre le dit Platt, ce qui a été accepté par le Notaire, la dite Dame Perrault n'étant pas présente. On a prétendu que cette acceptation par le Notaire était nulle. Je ne le pense pas, et je crois que cette prétention est contraire à la Jurisprudence de nos Cours en pareille matière, du moins en ce qui concerne de simples obligations. Du reste, le dit acte a été dûment signifié par le Notaire au dit Platt, le surlendemain de sa passation, c'est-à-dire le 4 du dit mois de Novembre. Le Statut Provincial, 13 et 14e. Vic. ch. 39, s. 11., dit : " toutes notifications, significations et protestations faites par les Notaires, à la requisition d'une partie et " sans qu'elle ait accompagné les Notaires ou le Notaire, ni signé l'acte, seront " authentiques et feront preuve par elles-mêmes de leur contenu jusqu'à récusation ou désaveu par la personne (ou autres ayant droit) au nom de qui ces " significations, notifications et protestations ont été faites " (Statuts Ref. du Bas-Canada, ch. 73. s. 27.)

L'acte de signification du 4 Novembre comporte, ce me semble, une ratification, par Mde. C. M. Perrault, du transport du 2, jusqu'à désaveu de sa part. Or ce désaveu est loin d'avoir été fait. La signification lie donc le débiteur délégué, M. Platt, aussi bien qu'il lie la dite Dame et le cédant Barnard, parties au dit acte du 2 Novembre. Il y a plus, c'est qu'il y a eu encore ratification de la part de la dite Dame C. M. Perrault, d'abord par son *Opposition à la délivrance des deniers*, formulée par elle le 28 Mars 1860, entre les mains du Sheriff Boston, dans la dite cause de Barnard contre Platt, et encore plus formellement, si c'est possible, par sa Requête en intervention en cette cause. La dite Dame C. M. Perrault serait bien malheureuse si, avec toutes ses ratifications, ses prétentions ne pouvaient pas être maintenues.

Le Jugement du 30 Juin 1859, obtenu par Barnard contre Platt, a été dûment enregistré le 6 Juillet suivant. De là hypothèque légale et générale acquise au dit Barnard sur les immeubles du dit Platt, laquelle hypothèque dûment transmise à la dite Dame C. M. Perrault par l'effet du susdit transport et de sa signification, *pour autant*.

Platt, après la saisie de ses immeubles par le Sheriff a payé entre les mains de ce dernier le montant réclamé par cette saisie, savoir £414 7 7. Cette somme, le Sheriff Boston l'a reçue *en sa qualité de Sheriff*, et, comme il le dit lui-même dans sa déclaration sur la saisie-arrest dont il s'agit, "*in satisfaction of a debt*," c'est-à-dire en paiement de la dette du dit Platt, de laquelle dette la dite Dame C. M. Perrault était alors saisie, pour la plus grande partie. Ce que Platt payait ainsi sous la saisie de ses immeubles, et ce que le Sheriff recevait en qualité de Sheriff, était donc la créance de la dite Dame C. M. Perrault. Platt payait au nom de la Justice et était à l'avenir libéré; le Sheriff recevait ainsi au nom de la Justice, et recevait pour la créancière Madame C. M. Perrault, dûment saisie du montant du transport, il doit lui payer ce montant.

La saisie-arrest faite entre ses mains n'a pas été faite en sa qualité de Sheriff, mais seulement en son nom individuel. Comme tel, il n'avait rien appartenant à Platt, ni à Barnard. En qualité d'officier de la Justice, il avait la somme ci-haut mentionnée.

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Par son intervention, Madame C. M. Perrault conclut à la nullité, pour autant, de la dite saisie-arrest, et pour l'excédant de sa réclamation, elle conclut à ce que la dite saisie-arrest soit déclarée bonne et valable en ce qui peut regarder le dit Barnard. Je ne vois pas d'objection à accorder la première partie de ses conclusions; Quant à la seconde partie, j'y vois une grande objection, c'est que la saisie-arrest est contestée par le défendeur Barnard, par deux exceptions péremptoires où il raconte toutes ses transactions avec son ancien client M. Olivier Berthelet, et que cette contestation subsiste encore.

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Par la conclusion prise pour elle-même dans son intervention, il est évident que Madame Perrault veut procéder ultérieurement sur son Opposition à la délivrance des deniers, pour obtenir le paiement de la balance qui lui est due, sur le dit acte d'obligation et transport, savoir la somme de \$1050 ¹⁰⁰/₁₀₀, avec intérêt sur icelle à compter du 15 Nov. 1859. C'est probablement la manière la plus régulière de procéder.

MEREDITH, J.—It is plain from the return of the Sheriff, that the sum of money mentioned in the declaration of John Boston, is the amount of the judgment in the case No. 493, *Barnard vs. Platt*; a part of which was transferred to the appellant by the deed of the 2nd November, 1859.

The question, therefore, which we have to determine is this: Had that sum of money been lawfully transferred to the appellant, to the extent claimed by her before the attachment thereof by the respondent?

The objection to the transfer in favour of the appellant, is that it has not been lawfully accepted. As to this point, I am of opinion that the acceptance of the Notaries set forth in the deed of transfer must be considered as extending to every part of that instrument, exactly in the same way as if the appellant had been personally present at the passing of the deed; in which case it could not be contended that it would have been necessary for her to repeat her acceptance of each of the covenants made in her favour.

There still however remains the question whether the notary, having power to accept the deed as an obligation, which he certainly had, (1) had also power to accept that part of the deed which was in effect a transfer. Upon this point I do not think it necessary to express an opinion, because the appellants may, I think, rely with confidence on the signification of the transfer made on the 4th Nov., 1859, "à la réquisition des appelants" as a ratification of the notarial acceptance for her.

This view is justified by the 11th section of the 13 and 14 Vict., Cap. 59, which has already been quoted by the Chief Justice, and is also in accordance with the judgment of this Court, in the case of *Ryan and Halpin*. (2)

In that case the Court decided that the acceptance of an obligation creating a special hypothec, was not necessary to give validity to such special hypothec, and also (vide second considérant of the judgment of the Court of Appeals) "qu'en supposant même que cette acceptation fut nécessaire, l'enregistrement fait de la dite obligation équivaldrait à cette acceptation.

(1) *Ryan vs. Halpin* 6 L. O. R. 62, and the authorities there collected.

(2) *Ryan vs. Halpin*, 6 L. O. R. p. 70; Sir L. H. Lafontaine, Bart., O. J., Aylwin, Duval and Caron, Justices.

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Now it will hardly be contended that the signification of the transfer under the statutory provision already averted to, ought not to be as effectual in the way of a ratification of a deed, as the enregistration of such deed.

I therefore think that the transfer in favour of the appellant, ought to have been maintained, and that, in so far as may be necessary to give effect to it, we must reverse the judgment of the Superior Court.

Le jugement en appel fut motivé comme suit.

The Court * * * seeing that it is established, that the sum of £391 5s currency, and certain interest, mentioned in the declaration of John Boston, one of the *tiers saisis*, made in this cause, on the 11th day of April, 1860, was received by the said Boston, as Sheriff of this District, on the 27th day of March, 1860, under and by virtue of a certain writ *de terris*, issued in the cause No. 493, in the Superior Court for this District, in which Edmund Barnard, Esquire, Advocate, was plaintiff, and John Platt, Esquire, Advocate, was defendant.

Seeing that by the deed styled "Obligation, mortgage, and transfer," bearing date the 2nd day of November, 1859, executed before Hunter and his colleague Notaries Public, the said Edmund Barnard acknowledged to be indebted to Dame Charlotte Mathilde Perrault, the appellant in this cause, in the sum of \$1125 currency, and by the said deed, promised to pay the said debt to the said Dame Charlotte Mathilde Perrault, thereof accepting by the said notaries on demand, with interest at the rate of six per centum from the date of the said deed.

Seeing also that by the said deed, the said Edmund Barnard declared that he thereby assigned, transferred, and made over to the said appellant, to the amount of the said debt, and interest, the said judgment in his favour against the said John Platt, in the said cause No. 493, in satisfaction whereof the said John Boston so received the said sum of £391 5s., so mentioned in his said declaration.

Seeing, also, that by a certain notarial instrument, bearing date the 4th day of November, 1859, a copy whereof is filed in this cause, the said Hunter and his colleague, Notaries Public, declare that at the request and instance of the said appellant, they repaired to the Montreal House, in the city of Montreal, and there being and speaking to the said John Platt, did signify and make known to him the said deed of Obligation and Transfer hereinbefore mentioned, and did, then and there, in due course of Law, serve a copy of the said obligation and transfer upon him, and also a copy of the said deed of signification.

Seeing that by the 27th section of the chapter 73 of the Consolidated Statutes of Lower Canada, it is declared that "Every notification, protest, and service thereof, made by any notary at the request of a party who has not accompanied such notary nor signed the deed, shall be authentic, and be evidence in themselves of their contents until called into question or disavowed by the person in whose name such notification, protest, and service have been made, or any other to whom it appertains."

Considering that the said signification of the said deed of obligation and transfer at the instance of the said appellant, was a valid and sufficient ratification by

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her of the said acceptance on her behalf of the said deed of obligation and transfer.

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Considering therefore that under and by virtue of the said transfer so ratified as aforesaid, the said Judgment, in the said cause No. 493, to the extent already mentioned, became legally vested in the said Appellant on the said 4th day of November, 1859; and therefore, so became vested in her, long before the attachment of the amount of the said judgment under and by virtue of the *saisie-arrest* in this cause issued on the 27th day of March, 1860,

Considering therefore, that in the Judgment rendered in this cause, by the Superior Court, in which it is, in effect declared that the said transfer was not legally accepted by the said Appellant, there is error. The Court doth in consequence reverse the said Judgment to wit, the judgment rendered by the Superior Court in this cause on the 26th day of December 1860. And proceeding to render the Judgment which the said Superior Court ought to have rendered in the premises doth maintain the intervention filed in this cause by the said Appellants, and doth declare that the said judgment debt, in the said cause No. 493, to the extent of the said sum of \$1125 currency, with interest as aforesaid became, on the said 4th day of November, 1859 legally, vested in the said Dame Charlotte Mathilde Perrault the appellant.

And this Court doth in consequence set aside and annul, to the extent of \$1050.85 with interest from the 15th day of Nov. 1859, that being the balance now due on the said debt of \$1125, the *saisie arrêt* in this cause issued, and doth, to that extent, and in no greater extent, *grant main levée* of the said *saisie arrêt* to the said John Boston and John Platt, and this Court doth also declare that the said sum of £391.5.0, so declared by the said John Boston to be in his hands, and which was so paid to him by the said John Platt, belongs to the extent of the said sum of \$1050.85 with interest from the 15th day of Nov. 1859, to the said Dame Charlotte Mathilde Perrault, the appellant, and it is ordered that the record in this cause be remitted to the Court below, in order that, after the representatives of the said John Boston shall have been made parties in this cause, such further proceedings respecting the payment of the said sum of \$1050.85 and interest as aforesaid, may be had, as to law and justice appertain.

And this Court doth condemn the respondent to pay the appellants their costs, in the Court below, on the contestation by the respondent of the intervention of the said appellants, and also the costs of them the appellants in this cause.

Jugement infirmé.

R. & G. Laflamme, pour les appelants.

J. A. A. Belle, pour l'intimé.

F. W. T.

MONTREAL, 27 NOVEMBRE, 1863.

Coram MONK, J. A.

No. 1233.

Gauthier vs. Méneclier de Morochond.

- JURÉ:—1. Que la prescription des reprises matrimoniales de la femme qui a obtenu une séparation de biens d'avec son mari ne court pas durant le mariage et pendant qu'elle est sous puissance de mari.
2. Que le légataire universel en usufruit de la femme séparée de biens peut exercer telles reprises matrimoniales contre la succession du mari, après le laps de trente ans écoulés durant le mariage et depuis le jour de la sentence rendue.
3. Que la clause du testament du mari, par lequel il institua son épouse sa légataire universelle en usufruit à la charge "de payer et acquitter les dettes du testateur" n'a pas eu l'effet dans l'espèce actuelle, d'opérer aucune confusion en la personne de son épouse survivante quant à ses reprises matrimoniales, par son acceptation de ce legs.

Par sa déclaration, le demandeur alléguait :

Contrat de mariage entre feu François Méneclier de Morochond et feu Marie Françoise Gauthier, reçu le 18 juillet 1822, Mtre. J. M. Cadieux, N. P., dans lequel contrat de mariage les parties avaient arrêté une communauté de biens, stipulation de propres, don mutuel et douaire de 3,000\$ ancien cours, et inventaire des biens de la femme, devant se faire sous 15 jours.

Insinuation de ce contrat, le 30 novembre 1822.

Inventaire susdit fait le 29 juillet et le 17 août 1822, dont acte par Mtre. J. M. Cadieux, le 29 novembre 1822.

La valeur des biens meubles portés en cette inventaire se montant à \$2,493-77, les dettes actives à \$1,585, y compris \$1,228 en argent sonnait.

Apport de la dite feu Marie Françoise Gauthier, de quelques immeubles estimés à \$61, et le sixième indivis d'un immeuble situé en la cité de Montréal, comme légataire grevée de substitution pour un sixième de feu Louis Gauthier, son père.

Vente par autorité de justice de cet immeuble au sieur Darius Bent, par acte reçu le 19 février 1823, Mtre. J. M. Cadieux, N. P.

Par acte de partage entre les légataires de feu Louis Gauthier, reçu le 14 de février 1824, Mtre. J. M. Cadieux, N. P., la part de la dite feu Marie Françoise Gauthier étant de 13,463\$-6d., ancien cours, lui fut déclarée payable par Darius Bent et Moses Knapp.

Jugement rendu à Montréal, le 8 juin 1826, ordonnant séparation de biens entre les dits François Méneclier de Morochond et sa dite épouse.

Rapport du praticien, le 22 janvier 1827, établissant les droits et reprises de feu Marie Françoise Gauthier, à 27,739\$-1s. 9d. ancien cours, sans intérêts; non compris les droits dans la succession du dit feu Louis Gauthier spécialement réservés; lequel rapport homologué le 19 février 1827.

Que cette séparation n'a jamais été exécutée, et la communauté n'a été dissoute qu'au décès de feu Frs. Méneclier, de Morochond, arrivé le 22 décembre 1857, et à cette époque les biens qui composaient cette communauté étaient d'au moins \$40,000.

Que, pendant la communauté et depuis le rapport du praticien, Frs. Méneclier de Morochond, par acte reçu le 15 mars 1827, Mtre. Cadieux, N. P., a cédé à

B. Ansell £115. 19. 2., dus avec plus forte somme à son épouse par les dits Darius Bent et Moses Knapp, et ce pour par lui demeurer quitte de pareille somme qu'il lui devait.

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Que le ou vers le 1er août 1837, Frs. Ménéclier de Morochond a reçu des dits Bent et Knapp la somme de 13,463\$-0. 6d., ancien cours.

Testament de feu François Ménéclier de Morochond, le 4 novembre 1856, Mtre. J. E. O. Labadie, N. P., instituant son épouse sa légataire universelle en usufruit, sans être tenue de donner caution ni de faire inventaire aux charges portées au dit testament et instituant sa sœur, la défenderesse, sa légataire universelle, et nommant son épouse son exécutrice testamentaire.

Qu'après son décès, sa veuve, tant en vertu de son don mutuel qu'en vertu du testament, s'est mise en possession des biens de la succession de son mari et en a joui jusqu'à son décès, arrivé le 26 juillet 1861.

Testament de feu Marie Françoise Gauthier, Mtre. Mathieu, N. P., le 29 décembre 1858, nommant le demandeur son légataire universel pour par lui jouir sa vie durant, des biens de la testatrice et la propriété d'iceux retourner à ses enfants après son décès et lui conférant l'exécution de son testament. Codicile le 7 avril 1860, Mires. Matthieu et J. H. Jobin, N. P., confirmant tel testament et enregistré le 9 août 1861.

Inventaire à la requête du demandeur des biens délaissés par la testatrice, le 29 juillet 1861, devant Mtre. Matthieu, N. P., évalués à £48. 8. 8.

Acceptation par la défenderesse du legs universel à elle fait par son frère et prise de possession en cette qualité de sa succession.

Qu'en conséquence, la défenderesse est tenue de payer les dettes de son frère et nominément le montant des reprises matrimoniales de son épouse, consistant dans les sommes ci-dessous, savoir :

1° Valeur des meubles portés en l'inventaire des 29 juillet et 17 août 1822, ...	\$4,079-86
2° Transport à B. Ansell, ...	460-00
3° Prix d'un immeuble vendu par feu Ménéclier à Messire Poirier, en 1826.	66-67
4° Obligation consentie par feu Ménéclier le 25 nov. 1837, à Guillaume Vallée et par ce dernier transportée à Mme. Ménéclier, le 15 mars 1839, Mtre. Labadie, N. P.	800-00
5° Le douaire.	500-00
6° Retiré par M. Ménéclier, comme sus-dit, 13,463\$-0. 6d.	2243-83

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Intérêt sur \$4,139.67, du 25 juillet 1822.

" sur celle de \$460, du 15 mars 1827.

" sur celle de \$2,243-83, du 1er août 1837.

" sur celle de \$500, du 24 décembre 1857.

" sur celle de \$800, du 25 nov. 1837.

De plus, la défenderesse est tenue de procéder au partage de la communauté. Le demandeur étant toujours prêt à rendre compte et représenter tous les meu-

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bles faisant partie des biens de la communauté et en la possession de Mme Ménéclier lors de son décès.

Conclusions pour le paiement des susdites sommes et intérêts, et demande pour reddition de compte et partage de la communauté, et licitation, si le cas y échet.

La défenderesse plaida diverses exceptions.

Par la première, elle prétendit : que la sentence en séparation de biens avait été dûment exécutée, en autant que feu Marie Françoise Gauthier avait renoncé à la communauté et qu'acte lui en avait été donnée en cour, le 3 octobre 1826, et en autant que par tel jugement en séparation de biens, elle avait été autorisée de jouir à part et divis des biens à elle appartenant, et en autant aussi que par le rapport du praticien dûment homologué, la dite Marie Françoise Gauthier a été dûment mise en possession de ses reprises et droits matrimoniaux, et que par suite de telle séparation de biens prononcée par la dite sentence même, par la dite renonciation et par l'homologation du dit rapport, constatant ses reprises et droits matrimoniaux, la dite Marie Françoise Gauthier a toujours joui à part et divis de ses biens et les a souvent exercés comme séparée de biens par divers procédés judiciaires reconnus et admis par les tribunaux du pays, et au vû et sçu de tout le monde, pendant plus de trente ans passés et écoulés avant l'institution de cette action et même avant son décès.

Que plus de trente ans se sont écoulés depuis l'échéance des prétendues créances alléguées et mentionnées en la dite déclaration.

Que les prétendues réclamations faites en cette cause par le dit demandeur sont prescrites et éteintes par le laps de plus de trente ans passés et écoulés depuis leur échéance respective.

Que, lors du décès de la dite Marie Françoise Gauthier, il y avait plus de trente ans que les prétendues sommes de deniers réclamées en cette cause par le dit demandeur étaient échues, (si jamais elles fussent dues, ce que néanmoins la dite défenderesse n'admet pas, mais au contraire nie formellement,) et partant la dite Marie Françoise Gauthier, lors de son décès n'avait plus aucun recours en loi pour le recouvrement d'icelles prétendues créances.

Que la dite défenderesse est bien fondée à opposer au dit Demandeur la prescription à l'encontre des prétendues créances qu'il réclame d'elle en cette cause.

Par sa seconde exception, la défenderesse prétendit : que feu Frs. Ménéclier de Morochond, par son testament, reçu le 4 novembre 1856, Mtre. J. E. O. Labadie, N.P., institua son épouse sa légataire universelle en usufruit, sans être tenue de donner caution ni de faire aucun inventaire mais aux charges suivantes :

- 1o. De jouir des dits biens en bon père de famille.
- 2o. De payer et acquitter les dettes du testateur, frais funéraires, et rétributions de messes.
- 3o. Enfin de payer à la défenderesse une rente annuelle et viagère y mentionnée et institua cette dernière sa légataire universelle.

Que la dite Marie Françoise Gauthier a accepté le legs en usufruit fait en sa faveur par le dit testament, s'est mise en possession en vertu du dit testament de

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tous les biens délaissés par le dit testateur à son décès, a fait don au demandeur d'une grande partie des meubles délaissés par le testateur, et a dissipé le reste, n'a payé, ni acquitté aucune des dettes du testateur, excepté la rente annuelle et viagère léguée en faveur de la défenderesse, quoique le revenu annuel des propriétés délaissées par le dit testateur fût de plus de trois cents livres courant.

Que la dite Marie Françoise Gauthier, ayant accepté le legs en usufruit fait en sa faveur dans le dit testament de feu son époux et s'étant mise en possession de tous les biens qu'il avait délaissés et en ayant joui sa vie durant, n'a pu le faire qu'à la charge spéciale contenue au dit testament, savoir : "de payer et acquitter les dettes du dit testateur, frais funéraires et rétributions de messes."

Que partant la dite Marie Françoise Gauthier est devenue, par l'acceptation du dit legs en usufruit débitrice de la succession du dit feu François Ménéclier de Morochond et en conséquence tenue et obligée de payer et acquitter toutes les dettes qui pourraient être dues par icelle succession et partant, en supposant que la dite légataire en usufruit eût pu exercer aucune créance contre la succession de son dit époux, elle s'est, par l'acceptation du dit legs en usufruit, trouvée débitrice, et créancière tout à la fois et, partant, aucune créance qu'elle aurait pu prétendre avoir contre icelle succession, s'est trouvée dès lors éteinte par la confusion opérée en sa personne.

Que partant, la dite Marie Françoise Gauthier n'a pu transmettre au demandeur aucune créance contre la dite succession de son mari, attendu que lors de son décès il y avait en confusion en sa personne, comme susdit; des créances qu'elle aurait pu prétendre exercer avant son décès contre la succession du dit testateur, dont elle est devenue la débitrice par l'acceptation qu'elle a fait du dit legs universel en usufruit à la charge par elle de payer et acquitter les dettes du testateur.

Qu'il est dû, par la succession du dit testateur, diverses créances par lui contractées pour bâtir quelques unes de ses propriétés qui n'ont pas été payées ni acquittées.

Que la dite Marie Françoise Gauthier a dissipé les revenus des dites propriétés et a permis au dit demandeur qui était son agent et procureur, de les employer à son profit personnel.

Par sa troisième exception, la défenderesse prétendit que le dit demandeur, n'étant que légataire en usufruit de Dame Marie Françoise Gauthier en vertu de son testament en date du 29 décembre 1858 et tenu de fournir sa caution juratoire et de faire faire bon et loyal inventaire des biens délaissés par cette dernière, est non recevable à réclamer les prétendues créances par lui demandées en cette cause, et nommément à demander à procéder à un partage de la manière par lui énoncée et requise en sa présente demande.

Que le prétendu inventaire de tous les prétendus meubles, créances et immeubles de la dite Marie Françoise Gauthier, n'ayant été fait d'après les allégués du demandeur que le 29 juillet et le 17 août 1862, après la célébration du mariage de la dite Marie Françoise Gauthier avec le dit feu Frs. Ménéclier de Morochond qui avait eu lieu le 25 juillet 1862, est irrégulier, informe et illégal et nul et de nul effet en autant que les dits époux ne pourraient plus après leur mariage, et durant icelui-ci faire ou consentir un pareil acte et déroger aux droits acquis lors de la

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célébration de leur mariage, et partant tel inventaire est nul et illégal n'a pu former partie du contrat de mariage qui a pu intervenir entr'eux avant leur mariage.

Que par tel contrat de mariage, la dite feue Marie Françoise Gauthier était tenue auparavant que d'accepter le don mutuel y énoncé, de fournir sa caution juratoire et de faire bon et loyal inventaire, ce qu'elle n'a jamais fait.

Que le prétendu montant de trois mille livres, ancien cours, pour le douaire créés en faveur de la dite Marie Françoise Gauthier et que le demandeur réclame en cette cause, n'est jamais devenu dû et échu en faveur de la dite Marie Françoise Gauthier, qui n'en est jamais devenue créancière, et que d'ailleurs le fût-elle devenue (ce que la dite défenderesse néanmoins nie formellement), elle en est en même temps devenue débitrice par et en vertu du testament solennel du dit feu son mari, reçu le 4 novembre 1856.

Que le dit feu François Ménéclier de Morochond n'a jamais retiré ni collecté aucune somme de deniers qui fût propre à la dite Marie Françoise Gauthier, et ne s'en est jamais attribuée aucune, en autant surtout que c'est la dite Marie Françoise Gauthier qui a toujours géré et administré ses biens, comme séparée de biens avec lui, et qui en cette qualité a comparu aux divers actes et contrats qui ont pu être passés dans le temps, et qui ont été confirmés et ratifiés par elle, en sa qualité de femme séparée de biens de son dit époux.

Par sa quatrième exception la défenderesse prétendit :

Que durant son usufruit des propriétés susdites en vertu du dit testament, la dite Dame Marie Françoise Gauthier avait pour agent et procureur le demandeur, qui a fait et consenti les baux des propriétés susdites, quelquefois en son nom personnel et néanmoins dans l'intérêt de la dite légataire en usufruit, étant fondée d'une procuration reçue le vingt sept janvier mil huit cent cinquante-neuf, par devant Mre P. Mathieu et son confrère, notaires.

Que la dite feue Marie Françoise Gauthier a été bien et dûment séparée de biens du dit testateur, son époux, et ce durant trente ans avant le décès de la dite feue Marie Françoise Gauthier, et laquelle qualité le dit demandeur a souvent reconnue et admise par divers actes et contrats notariés, authentiques et autres.

Que la dite feue Marie Françoise Gauthier n'a jamais accepté le don mutuel énoncé en son contrat de mariage avec le dit feu François Ménéclier de Morochond, en autant qu'elle ne pouvait le faire qu'à sa caution juratoire et en faisant bon et loyal inventaire, ce qu'elle n'a jamais fait et partant n'a jamais appréhendé les biens délaissés par son dit époux autrement qu'en sa qualité de légataire universelle en usufruit en vertu du dit testament.

Que le revenu annuel des propriétés ainsi délaissées par le dit testateur, était et a toujours été de plus de trois cents livres courant et dont le dit demandeur en sa qualité de procureur de la dite feue Marie Françoise Gauthier, a disposé à son profit personnel, et a toujours converti à son usage sans jamais lui en rendre compte, en sorte que la dite feue Marie Françoise Gauthier n'a jamais payé les dettes dues hypothécairement sur les dites propriétés, et qui s'élèvent au montant de près de £500, et ce à la connaissance personnelle du dit demandeur, qui a ainsi mal administré les dites propriétés durant l'usufruit de la dite feue Marie Françoise Gauthier, qui a toujours agi comme séparée de biens du dit feu Fran-

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çois Ménéclier de Morochond et qui de son vivant n'aurait accepté l'usufruit de telles propriétés, si elle eût prétendu devoir exercer aucune créance contre la succession de son dit époux.

Que tantant la dite défenderesse est bien fondée à opposer la mauvaise foi du dit demandeur; ainsi que son incapacité à procéder au partage par lui demandé, et à vouloir changer dans son propre intérêt et de mauvaise foi, l'état civil des deux époux maintenant décédés, et qui a existé durant plus de trente ans entr'eux sans aucune réclamation de leur part et qui a été sanctionnée de bonne foi par les tribunaux du pays durant trente ans passés et écoulés avant leur décès.

Le demandeur répondit spécialement à la première exception :—

Que Madame Ménéclier avait en maintes occasions, même après le dit jugement en séparation, agi comme étant encore commune en biens,—

Que d'ailleurs la prétendue renonciation de la dite Marie Françoise Gauthier n'a jamais été insinuée au greffe, tel que requis par la loi, et qu'elle est en conséquence nulle et de nul effet.

Que la dite Marie Françoise Gauthier, ayant été sous puissance de mari et commune en biens jusqu'au décès du dit François Ménéclier de Morochond, arrivé le ou vers le vingt-deux décembre mil huit cent cinquante-sept, n'a pu exercer ses reprises et ses créances contre le dit François Ménéclier de Morochond et que la prescription a été suspendue pendant leur mariage à l'égard de toutes les réclamations qu'elle pouvait avoir contre le dit François Ménéclier de Morochond.

Que la dite prescription a encore été suspendue depuis le décès du dit feu François Ménéclier de Morochond, par le fait que la dite dame Marie Françoise Gauthier a eu l'usufruit de ses biens en vertu du don mutuel contenu en son contrat de mariage.—

Que la dite défenderesse ne peut en conséquence invoquer la prescription comme elle le fait par sa dite exception.

Le demandeur répondit spécialement à la seconde exception:

Qu'en supposant que la dite Marie Françoise Gauthier aurait accepté le legs en usufruit fait par le testament du dit François Ménéclier de Morochond, elle n'aurait pas été par là tenue de payer et acquitter les dettes de la succession du dit feu François Ménéclier de Morochond sur et à même ses propres biens, mais seulement de payer les dites dettes sur et à même les biens de la succession du dit Sieur Ménéclier de Morochond, et qu'il ne se serait opéré aucune confusion, et qu'en conséquence les créances que la dite Marie Françoise Gauthier avait contre la succession de son mari n'auraient pas été éteintes, mais seulement suspendues pendant la durée du dit usufruit.

Et le dit demandeur nie qu'il soit dû aucune somme de deniers par la succession du dit François Ménéclier de Morochond autre que celles qui sont dues au dit demandeur comme représentant la dite Marie Françoise Gauthier.

Le demandeur répondit à la troisième exception:

Qu'il n'est pas tenu de fournir caution pour jouir des biens à lui légués par la dite Marie Françoise Gauthier, mais qu'en supposant qu'il le serait, la défenderesse, n'ayant aucun intérêt dans la dite succession, n'est pas en droit d'invoquer ce défaut de cautionnement à l'encontre de la présente action; d'ailleurs le dit demandeur allègue que, par les termes du testament de la dite feu Marie

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Françoise Gauthier, le dit demandeur avait la jouissance des biens à lui donnés par le dit testament à sa caution juratoire, et qu'il s'est conformé à cette exigence de la dite testatrice et prêté serment et rempli les formalités requises en pareil cas, et en faisant bon et loyal inventaire.

Que les créances du demandeur, mentionnées en la déclaration, et notamment celle de trois mille francs, ancien cours, pour le douaire orléen en faveur de la dite Marie Françoise Gauthier n'ont jamais été éteintes par confusion tel que le prétend la défenderesse; que le dit demandeur est encore fondé à réclamer la somme de deux mille quatre cent quatre-vingt-trois francs ancien cours, et mille cinq cent vingt-deux francs, même cours, à raison de la stipulation contenue dans le contrat de mariage du dit François Ménéclier de Morochond et de la dite Marie Françoise Gauthier, que cette dernière reprendrait ce qu'elle aurait apporté au dit mariage, et que l'inventaire qui a été fait des meubles apportés à son dit mariage par la dite Marie Françoise Gauthier est bon et valable, cet inventaire ayant été fait immédiatement après le mariage en vertu d'une réserve et clause spéciale du dit contrat de mariage.

Qu'il est faux que la dite Marie Françoise Gauthier ait, du vivant du dit François Ménéclier de Morochond, géré et administré ses biens et affaires, lesquelles ont toujours été gérées et administrées par le dit François Ménéclier de Morochond comme chef de la communauté qui existait entre eux.—

L'Honorable A. A. Dorion, conseil pour le demandeur.

1re. Question.

Le jugement en séparation de biens a-t-il été exécuté, et s'il ne l'a pas été légalement, le demandeur représentant Marie Frs. Gauthier peut-il invoquer ce défaut d'exécution pour demander le partage des biens de la communauté, tels qu'ils existaient à la mort de M. Ménéclier?

Tout jugement en séparation de biens, pour être valable, doit être exécuté. Le défaut d'exécution peut être invoqué par les tiers et par les parties elles-mêmes.

Coutume de Paris, art. 227.

Le Prêtre, 1re centurie, ch. 77.

Ferrière, G. O., t. 3, p. 366-7. Nos. 9 à 11.

Actes de notoriété du Châtelet, du 26 août 1702.

Duplessis, de la communauté, t. 1, p. 432-3-4; voir aussi note (d. d. et d.), p. 433.

Cet auteur dit expressément que la sentence non exécutée est nulle, tant à l'égard des créanciers que des conjoints eux-mêmes.

1. Bourjon, t. 1, p. 605, partie 5me de la communauté, ch. 3, sec. 1, No. 4.

2. Pothier, Communauté, No. 518.

Il faut que le mari ait restitué à sa femme sa dot ou, du moins, qu'elle ait fait des poursuites pour se la faire rendre et qu'elle ne les ait pas abandonnées.

3. Pothier, Coutume d'Orléans, sur l'art. 108; note 5, p. 343.

4. Pothier, puissance du mari, t. 3, p. 462, No. 10.

5. Le Brun de la communauté, liv. 3, ch. 1, p. 323, semble être d'opinion que la femme n'est pas fondée, après la mort du mari, à alléguer les nullités de la séparation qu'elle a elle-même obtenue, mais les deux arrêts qu'il cite, ont été rendus sur des circonstances spéciales et ne justifient pas la conclusion qu'en tire Le Brun. Il s'agissait de prétendues irrégularités dans les poursuites pour ob

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tenir une séparation qui avait été exécutée pendant un grand nombre d'années, et non d'un défaut d'exécution, qui rend la séparation d'aucune utilité.—Merlin séparation de biens, sec. 2, s. 3, art. 6.

7. Arrêtés de Lamoignon, tit. 32, art. 85.

8. Cubain, droits des femmes, p. 297, Nos. 500-1-2-3 et 4.

L'art. 1441 du Code Civil oblige la femme à poursuivre l'exécution du jugement de séparation dans les 15 jours et à les continuer sans interruption.

Troplong, contrat de mariage, t. 2, page 634, No. 1357; p. 637, No. 1360; p. 641, 1, No. 1364; p. 647, No. 133; p. 648-9, No. 1375.

L'ancienne législation ne fixait aucun délai pour exécuter la séparation, néanmoins cette exécution devait être poursuivie dans un délai raisonnable, à peine de nullité.

Dalloz, Rec. alp., t. 10, p. 236, No. 2.

Dalloz, Rec. Périodique, 1814, 2, 726.

Arrêt du 9 août 1814.

Dalloz, Rec. Pér., 1833, 1, 136.

Arrêt du 28 février 1833.

Rec. Pér., 1829, 1, 339.

De toutes ces autorités, il résulte que le jugement en séparation doit être exécuté dans un délai raisonnable, et que ce qui caractérise l'exécution, c'est le remboursement effectif des reprises ou la preuve légale au moyen de poursuite judiciaire et de procès-verbal de carance, que le mari n'a pas de biens pour satisfaire les créances de sa femme.

Il résulte aussi que la femme peut se prévaloir du défaut d'exécution et demander le partage de la communauté, comme s'il n'y avait jamais eu de jugement en séparation.

Dans l'espèce actuelle, il y a eu jugement en séparation et rapport du praticien homologué, mais il n'y a pas eu de remboursement de la dot et des reprises, ni d'exécution des biens du mari, quoiqu'il y ait preuve qu'il soit mort avec des biens considérables, acquis avec les capitaux et les revenus des biens de sa femme, puisqu'il est prouvé qu'elle avait des biens d'une grande valeur et qu'il n'avait pour vivre que le salaire d'un commis.

2^{me} Question.

Soit que le demandeur ait droit de demander le partage de la communauté ou non, a-t-il dans tous les cas, droit au donaire et au remboursement des créances de Mme Ménéclier contre son mari et d'abord ces créances sont-elles prescrites ?

1. Pothier, puissance du mari, Nos. 79 et 80.

2. Pothier, obligations, Nos. 680-1.

3. Le Brun, communauté, p. 345, liv. 3, c. 2, s. 1, dist. 1, No. 28 : "un mari ne peut jamais prescrire contre sa femme."

4. Le même, p. 505 et 506.

5. Pothier, introduction à la Coutume d'Orléans, p. 417, No. 39; Code Civil, art. 2253 : "elle ne court pas entre époux."

Troplong, des prescriptions, t. 2, p. 271; No. 742, p. 667, addition.

Proudhon, t. 4, p. 92, No. 1809.

Non seulement le mari ne peut prescrire, mais il est même responsable des prescriptions acquises contre sa femme pendant le mariage.

Troplong, mariage, t. 4, p. 690-1, No. 3585, et suivantes.

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3me Question.

Il n'y a pas eu de confusion.

Pothier, des obligations, Nos. 642 et 648.

Ricard, des donations, t. 2, p. 483.

"Quoiqu'il y ait confusion d'action pendant la jouissance de l'héritier (c. a. d. du grévé de substitution), néanmoins, après la restitution, les actions actives qu'il y avait contre la succession revivent, à moins que le testateur ne lui ait imposé la condition de remettre son dû et les actions passives que le défunt avait contre lui, reprenant ainsi leur force en faveur du fidéicommissaire.

Plus haut, l'auteur avait dit: ce qui est laissé par le défunt à son héritier, n'est pas présumé le dessein de compenser."

Troplong, contrat de mariage, t. 4, No. 3619.

La charge de payer les dettes et frais funéraires ne regarde que l'exécution du testament et n'impose à la légataire en usufruit et exécutrice que l'obligation de les payer à même les biens de la succession.

Tous les exécuteurs testamentaires sont chargés de payer les dettes et legs, mais cela ne s'entend pas qu'ils doivent le faire de leurs propres deniers.

Bourjon, t. 2, p. 327, ch. 4, des testaments, sec. 2, art. 2 et suiv.

Pothier, des donations, t. 4, p. 292, Nos. 221, 222, 223, 224 et 231, explication de l'art. 286, de la Coutume de Paris.

La coutume dit: "*payer et avancer*."

Le donataire mutuel, n'ayant que la jouissance de la part du prédécédé dans les biens de la communauté, il ne doit être tenu qu'à faire l'avance des dettes et charges," etc.

Pothier, t. 4, p. 324, interprétation de l'art. 68 de la Cout. de Dunois, qui contient ces termes: "Et payer les dettes, legs et funéraires du premier décédé," etc., p. 339, No. 38.

"Lorsque les conjoints ne se sont pas fait don mutuel en propriété de leurs meubles et conquêts, comme la coutume le leur permet, mais se sont fait ce don mutuel seulement en usufruit, les héritiers du donataire mutuel, lors de la restitution qu'ils doivent faire aux héritiers du prédécédé des biens dont le donataire mutuel a joui, doivent retenir sur les dits biens tout ce que le donataire mutuel a payé pour dettes, legs et funéraires du prédécédé, car ce sont charges des dits biens, qui les diminuent de plein droit."

4o: La défenderesse n'a aucun intérêt dans les biens légués au demandeur et ne peut invoquer le défaut d'inventaire et de cautionnement; il n'y a que les substitués ou légataires en propriété qui pourraient s'en plaindre. D'ailleurs l'inventaire a été fait et le cautionnement donné.

Voir exhibits, Nos. 4 et 5, filés le 23 février 1862.

Proudhon, t. 2, p. 218, No. 793. T. 2, p. 302, No. 815.

Enfin l'inventaire du 29 juillet et du 22 août 1822, annexé au contrat de mariage, et le partage de la succession Louis Gauthier, suffisaient pour constater l'apport de Frs. Gauthier.

Pothier, t. 2, p. 622, No. 298, No. 300.

Le mari est tenu de toutes les créances portées en l'inventaire auquel il a été partie.

Proudhon, t. 2, p. 274, No. 789.

D'après ce que dessus, le demandeur doit obtenir jugement, ordonnant le partage des biens de la communauté, tels qu'ils existaient lors du décès de M. Ménéclier.

1o. Parce que le jugement de séparation n'a jamais été exécuté.

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20. Parce que le mari a continué à gérer toutes les affaires de sa femme et qu'il s'est enrichi avec le revenu de ses biens, et même avec ses capitaux.

Voir dépositions de

J. L. Beaudry.

J. D. Vallée.

J. A. Labadie.

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Morochond.

Voir l'exhibit No. 11 du demandeur, filé 18 nov. 1861 ; exhibit No. 1 du demandeur, filé 3 juin 1862.

30. Le demandeur doit dans tous les cas obtenir jugement.

10. Pour le douaire stipulé sans retour, Exh. No. 1 du demandeur.

Pothier, t. 4, p. 293, No. 224.

Bourjon, t. 1, p. 722, du douaire, tit. 13, sect. 4.

Rapporté, ... \$ 500.00

20. Valeur des meubles mentionnés en l'inventaire du 29 juillet et 22 août 1822 ; No. 1 exhibit du demandeur, ... 4079.86

Pothier, communauté, Nos. 298 et 300.

Lebrun, " p. 247, Nos. 47 et 48.

Troplong, contrat de mariage, Nos. 1986, 3628, 3633.

30. Montant du transport à Benjamin Ansell, exhibits Nos. 11 et 12 du demandeur, ... 460.00

40. Montant de l'obligation consentie à Guil. Vallée et transportée à Mme Ménéclier, M. Frs. Gauthier, exhibits de la défenderesse, Nos. .. 800.00

50. Prix de vente de Messire Poirier, rapport du pratic. exhibit du demandeur, No. 8, ... 66.67

60. La somme de \$13,463.60, exhibits Nos. 5, 6 et 13 du demandeur, ... 2243.83

\$9150.36

Pothier, communauté, No. 300.

Lebrun, " p. 247, Nos. 47 et 48.

" " p. 474.

Troplong, contrat de mariage, t. 4, Nos. 3586, 3589, 3590, p. 694 et suivants.

Cubain, traité des droits des femmes, p. 180, No. 312.

Le demandeur doit de plus obtenir les intérêts sur ces reprises et créances, à compter de la mort de Mme Ménéclier, si la communauté n'a pas été dissoute par le jugement de séparation, et à compter du jugement de séparation, s'il a eu l'effet de dissoudre la communauté.

Le demandeur doit aussi avoir les intérêts du douaire, à compter du décès de Mme Ménéclier.

La raison pour laquelle les intérêts ne sont dus que de la mort de Mme Ménéclier, c'est que Mme Ménéclier ayant eu l'usufruit des biens de M. Ménéclier, il y a eu confusion d'intérêts pendant cette jouissance.

Guyot, Rép., vo. intérêts, p. 459 et 460.

Pothier, communauté, No. 521.

Lamoignon, arrêtés, tit. 32, art. 72.

Le Brun, p. 423, No. 33.

Ferrière, Parfait Notaire, t. 1, p. 139, c. 14.

Massé, t. 1, p. 276.

Troplong, contrat de mariage, No. 3672.

Rousseau de Lacombe, les intérêts, p. 393. No. 11 ; intérêts du douaire dus du jour qu'il est échu, même dans les coutumes où il faut le demander.

Gauthier
et
Ménéclier de
Morochond.

* *P. R. La Frenaye* pour la défenderesse.

1o. Comment se prouve l'exécution de la sentence en séparation de biens ? Actes de notoriété, page 325, 20 juillet, 1807 : " Il est vrai que l'exécution de la sentence se fait et se prouve communément par une vente de meubles ; mais elle se peut faire, 1o. par un partage de la communauté ; 2o. par la restitution de la dot ; 3o. par des saisies réelles ; 4o. et des *oppositions aux décrets*. 5o. et *généralement* par les actes *sans fraude*, qui *CONDUISENT À L'EXÉCUTION* de la sentence." Et vide note b.

Ainsi la vente du 3 avril 1827, faite et constatée par Dumouchelle, N. P., et alléguée dans les moyens d'opposition de Dame Morochond, exhibit No. 4 filé le 1er octobre 1862, et la vente faite le 19 septembre 1827, exhibit H., filé le 6 septembre 1862, étant des actes faits *SANS FRAUDE*, ont eu l'effet de conduire à l'exécution de la sentence. Cette *opposition, réclamant des meubles* par Dame Ménéclier, est assermentée par elle se portant *séparée de biens*, et est un des cas ci-dessus cités pour opérer l'exécution de la séparation, et dont elle s'est servie au soutien de son opposition.

Pour l'exécution, il suffit de la *renonciation* ou bien d'un partage ou vente et cession *volontaire* par le mari à la femme, et la vente du 19 septembre 1827 en était une. Renusson, Com: Nos. 61 et 62, p. 197.

Le Brun, de la Com: p. 321 et suivantes.

1er vol. L. C. Jurist, Sénécal, appelante, Labelle, intimé, et les autorités y citées.

Lorsque Bourjon a écrit sur l'exécution de la séparation, tom. 1er, p. 605, partie 5, de la communauté, chap. 3, sect. 1ère, No. 4, il oubliait ou ne connaissait pas les principes du Chatelet de Paris, qui sont consignés dans l'acte de notoriété de ce même Chatelet dont parle Renusson, en date du 26 juillet 1807. Cette renonciation doit se faire au *greffe*.—Ancien Denizart, vo. Renonciation à la Comm. No. 14, page 226. Loisel, Inst. Cout. liv. 1, titre 2, no. 13.

Cette renonciation de la part de Madame Ménéclier a toujours été considérée suffisante par les cours de justice, puisque dans la cause contre Darius Bent, le 20 février 1832, la Cour lui a donné jugement, et sa *qualité de femme séparée de biens* a été reconnue et sanctionnée par tous les tribunaux du pays, chaque fois qu'elle a exposé ses droits, et la procédure sur sa séparation de biens a été jugée suffisante.

Vide sa poursuite, jusqu'au décret contre Darius Bent. Exhibits filés le 3 décembre 1861.

Ce décret équivalant à un acte sans fraude, étant un acte judiciaire et solennel, et en vertu duquel Darius Bent a été exproprié et ses créanciers ont été colloqués pour leur dû.

La poursuite et le jugement contre Duclon, 13 mars 1854.

2o. La femme, ayant une fois obtenu sa sentence de séparation de biens, a trente ans pour l'exécuter.

Bender, App., Jacobs, intimés. Jugement de la Cour d'Appel, rendu le 10 mars 1846. 1 vol. de la Revue de Légis. et de Juris., page 392.

" Sir James Stuart. (*dissentiens.*)

Mr. Justice Bowen,

" Panet,

" Bédard,

" Gairdner.

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" Considering likewise that the said Angélique Jacobs, the respondent, having, in pursuance of the said judgment and for the purpose of carrying into execution, *duly renounced* to the said community which existed between her and her husband, the appellant, the same could not be legally re-established, but by an *authentic act* or agreement by and between the said parties... "...and that the right of the said respondent, to cause the said judgment of *séparation de biens* to be duly executed, could only be *barred* by a lapse of *thirty years*, &c.

Ainsi la prescription de *trente ans* existe donc, *entre époux*, suivant la jurisprudence du Bas-Canada, car cette *jurisprudence* avait été déclarée telle par deux jugements rendus par la Cour de première instance, composée des juges Rolland, Gale et Day.

Or, dans la cause actuelle, le demandeur, comme représentant Mme Ménéclier, pourrait, tout au plus, mettre le jugement à exécution s'il n'y avait pas trente ans écoulés depuis qu'il a été rendu. De plus, par ce jugement, l'on voit que la *renonciation seule* est considérée comme ayant l'effet de mettre la séparation de biens à exécution, puisqu'il y est dit : " in pursuance of the said judgment for the purpose of carrying it into execution, *duly renounced* to the said community... the same could not be legally re-established." Ainsi, dans cette cause-là, il a été jugé que la communauté avait été dissoute par la renonciation et ne pouvait plus être rétablie que par un acte authentique, quoique l'épouse eût des reprises à exercer.

Lorsque le jugement porte " que la demanderesse sera et demeurera séparée quant aux biens d'avec le dit défendeur, son mari, du jour de sa demande pour " par elle jouir à part et divis de ceux à elle appartenant,"—etc. exhibit No. 1, filé le 5 février 1862, et exhibit No. 4, filé le 5 février 1862,—et que la renonciation a été faite et acte en a été donné, (vide exhibit, No. 5, le 5 février 1862,) la *renonciation seule* est une exécution valable de la sentence.

1o. Lower Canada Jurist, p. 273, Sénécal et Laballe.

Reconnaisances de Madame Ménéclier de Morochoud comme étant séparée de biens, entr'autres les suivantes :

3o. Elle assermente son opposition afin de distraire, 20 mai 1828. (Exhibit No. 2, filé le 1er octobre 1862.)

4o. Cession par Gladu, 2 janvier 1829. (Exhibit G. du demandeur, filé le 6 septembre 1862.)

5. Bail à loyer par Mme Ménéclier, 26 octobre 1829, à

6. Bail à ferme par Mme Ménéclier à Jon. Godard, 27 septembre 1830. (Exhibit No. 3, filé le 3 juin 1862.)

Transport par le Dr. Vallée à Madame Ménéclier, allégué par le demandeur, 15 mars 1830, même en sa déclaration qui en réclame le montant. Exhibit de la défenderesse, filé le 6 oct. 1862.

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1. Acceptation du transport sur Benj. Ansell, 19 mars 1827; exhibit du demandeur filé 18 novembre 1861.

2. Bon de Charbonneau, 28 oct. 1827, exhibit No. 9, filé le 3 juin 1862.

30. Il faut un acte par écrit, exprès, précis et formel, pour rétablir la communauté. Le jugement en appel de Bender *vs.* Jacobs le démontre.

De plus, vide Brodeau sur Louët, lettre S., No. 9, p. 954, "que le tacite consentement de la demeure et habitation, par quelque temps que ce soit, des contracts passez par la femme seule, ou avec son mari, sans prendre qualité de *séparée*, des baux à ferme du revenu de son bien, faits par le mari, des quittances par lui baillées en son nom, du mélange des biens, et autres pareilles circonstances remarquées en la loi, *itaque 64 pro socio, ne sont pas suffisantes* pour rompre et annuler la séparation, réintégrer et restablir la société dissolue, s'il n'y a acte par écrit, exprès, précis et formel." etc., etc.

Voir aussi le No. 8, arrest de 1821, excluant les enfants de la communauté etc., etc.

40. Le défaut d'exécuter résultant de quelques nullités ne peut pas être allégué par la femme ni par ses héritiers.

Louët, lettre S., No. 5, éd. de 1668, page 952 :

"Et outre, il est nécessaire que la séparation soit effectuée et exécutée par la renonciation à la communauté, ou par un inventaire et partage des biens d'icelle, fait sans fraude."

"Mais néanmoins, je n'estimerai pas que ce défaut d'exécution peut être allégué, et proposé par forme de nullité, que de la part des créanciers, et non de la femme ou ses héritiers pour prétendre part en la communauté, au préjudice de la séparation, ordonnée en connaissance de cause."

Or, dans la cause actuelle, l'héritier de Dame Ménéclier propose des moyens de nullité bien frivols, puisque Dame Ménéclier a renoncé à la communauté et qu'elle lui en a été donné par le jugement rendu le 3 octobre 1826, et qu'elle-même a fait exécuter sa sentence par divers actes sans fraude, par des oppositions et des poursuites conduisant à l'exécution de la sentence sans fraude et des procédures solennelles, oppositions, décrets, jugements de distribution, transport de deniers, acceptés par elle et notamment celui du Dr Vallée, que le demandeur a lui-même invoqué.

Dans tout ce sommaire, Louët ne parle que de la renonciation ou de l'inventaire et partage des biens de la communauté, comme étant les deux seuls procédés suffisants pour effectuer l'exécution de la séparation.

Le Brun, liv. 3, chap. 3, p. 323, cite Henrys, et est d'opinion que la femme est non recevable à en alléguer la nullité, même dans le cas où cela avait été obtenu sans connaissance de cause, irrégulièrement, dans le cas où les conjoints l'auraient eux-mêmes considéré exécuté de bonne foi pendant un si grand nombre d'années. Il cite deux arrêts rendus sur des circonstances spéciales et analogues aux circonstances spéciales qui se trouvent dans la cause actuelle, et qui doit recevoir la même décision contenue dans ces deux arrêts.

Ce n'est pas Duplessis qui dit que la sentence non exécutée est nulle, tant à l'égard des créanciers que des conjoints, mais simplement son annotateur, qui n'en donne aucune raison valable, tandis que Louët, Brodeau, Le Brun et Henrys

firmement le contraire, et que leur doctrine est appuyée sur deux arrêts cités par Brun, et qui ont été rendus dans des cas spéciaux, comme cela doit toujours arriver, et comme ça se présente dans la cause actuelle. Or le demandeur lui-même reconnaît cette qualité de séparée de biens dans la déclaration, (quant au transport fait par le Dr. Vallée, en 1839,) et par sa déclaration volontaire dans l'intérêt de ses enfants comme de lui-même dans l'inventaire du 29 juillet 1861, où il ne reconnaît aucune créance due à Madame Ménéclier.

Or, d'après Lebrun, communauté, page 323, la femme, après la mort de son mari n'est pas fondée à alléguer de telles nullités, a fortiori, son héritier, après avoir fait de tels aveux.

50. De la confusion opérée en la personne de Dame Ménéclier par sa qualité de légataire en usufruit de son mari, à la charge expresse de PAYER SES DETTES.

Dans la cause actuelle, le droit d'accepter ce legs ne vient pas à legs, mais de la convention des parties ou plutôt de la volonté de l'homme; en sorte que les règles du droit coutumier sur les obligations du donataire mutuel, ne sauraient s'étendre à un cas résultant de la volonté de l'homme qui a appuyé à sa libéralité telle condition qu'il a voulu, et cette doctrine est établie formellement par les auteurs du nouveau Denisart, vo. contribution aux dettes, page 499, §3, No. 8: " nous observerons que l'ord. de 1441, art. 27, et la Coutume de Paris, art. 286, n'ayant rapport qu'à des espèces particulières d'usufruit, ne peuvent pas former une règle générale."

Si cette condition de payer les dettes n'eût pas été exprimée dans et par le testament, la légataire en usufruit n'ayant payé des dettes du testateur qu'au moyen d'une action indirecte contre elle *personalis in rem*, ou plutôt *ob rem*, aurait eu son recours en garantie contre la légataire universelle, tandis que, par l'effet de cette condition de payer les dettes, elle ne peut pas exercer aucun RECOURS EN GARANTIE contre l'héritier du testateur ou sa légataire universelle.

De plus, le testateur fait bien voir qu'il entend que le paiement de ses dettes est une charge spéciale du legs en usufruit qu'il fait à son épouse, puisqu'il ajoute " enfin de payer à sa sœur une rente viagère de £25."

Maintenant, si l'on considère que ces dettes ne doivent être que les créances dues sur la construction de quelques unes de ses maisons, l'on s'aperçoit que cette charge n'était pas exorbitante, et il ne devait rien à son épouse, car le demandeur lui-même l'a reconnu dans l'inventaire du 29 juillet 1861.

Lorsqu'il n'existe aucune disposition spéciale dans le testament, la contribution aux dettes par le légataire en usufruit se fait ainsi qu'il est indiqué au nouv. Den., vo. contribution aux dettes, §3, No. 8; Demolombe, vol. 10, p. 451 et suivantes.

Comme le testateur Ménéclier nommait son épouse son exécutrice testamentaire, il lui était inutile de l'obliger de payer ses dettes, s'il n'eût réellement pas voulu en faire une charge spéciale du legs en usufruit, et, d'un autre côté, si Madame Ménéclier eût cru que ces dettes étaient *ultra vires* du legs qu'il lui faisait, elle aurait pu très-bien répudier le legs et accepter plutôt le don mutuel.

Recueil de Jurisp., de Lacombe, vo. usufruitier, page 818, section 2, et de plus elle était tenue de faire inventaire, ainsi qu'il y est stipulé au contrat de mariage.

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Par la procuration donnée par elle à M. Badesaux le 11 janvier 1858, l'obligation en date du 16 février 1858, exhibits filés le 6 juin 1862; et No. 1 filé le 3 juin 1862, Mme Ménéclier ne s'est portée que comme légataire en usufruit; et elle n'a jamais pris la qualité de donataire mutuelle.

Si elle a accepté le don mutuel, elle doit faire confusion en sa personne de donataire réclamé pour sa part des dettes. Vide Pothier, Traité du Donaire, No. 193, 4e alinéa, partie 1e, ch. 4, art 3.

Arrêt du 11 août 1710, 5e vol. du Jour, des audiences—au supplément.

60. Reconnaissances du demandeur héritier de Mme Ménéclier.

Le 20 juillet 1861.—Inventaire, à la requête du demandeur, des biens délaissés par Mme Ménéclier.

“Dettes actives.”

“Le dit sieur Gauthier déclare qu'il ne connaît aucunes dettes qui peuvent être dues à la dite feue dame sa tante.”

“Quant aux immeubles, il n'en a été fait aucune mention aux présentes” suivant la demande du dit Gauthier, attendu qu'ils sont connus aux intéressés “à les connaître.” (sic),

Dans cet inventaire, le demandeur s'intitule “légataire universel,” et il fait ces déclarations de son plein gré et comme légataire en usufruit de Mme Ménéclier et conformément aux ordres contenus dans son testament, et cela pour assurer les droits de propriété de ses enfants légataires universels.

Le demandeur a reconnu la séparation de biens et son exécution; puisque sa demande, savoir: \$800, est basée sur un transport fait par Vallée à Mme Ménéclier de Morochond en sa qualité de séparée de biens, et il demande le recouvrement de cette créance que Mme Ménéclier ne pouvait obtenir que comme séparée de biens avec son mari, vo. l'exhibit No. 1 de la défenderesse, filé le 2 oct. 1862.

70. Le demandeur, n'étant que légataire universel en usufruit de Mme Ménéclier, par son testament, reçu le 29 décembre 1858, ne peut pas porter une action en partage et licitation.

Poncet—traité des actions, Nos. 78, 79, 80, 81.

Curasson—actions possessoires, page 13, No. 36.

Proudhon—de l'usufruit, vol. 3, page 235, No. 1259, etc., surtout le No. 1261, où il est même question si l'usufruitier peut porter l'action possessoire.

Il n'est qu'usufruitier par les termes du testament, puisqu'il est tenu de donner caution juratoire par ce testament, comme tout usufruitier.

Les actes concernant l'affaire Frappier—Forêt de 1814, 1816 et 1834, font voir simplement que cette créance a été convertie en une rente payable autant à Mme Ménéclier qu'à son mari.

L'acte de vente à Reneau, du 12 août 1827, prouve que ce terrain appartenait réellement à son mari.

Dans l'acte de vente de Labelle, en date du 12 août 1827, rien ne fait voir que ce terrain appartenait à Mme Ménéclier, et d'ailleurs le prix de vente est payable à eux deux.

Il en est de même de la vente à Granger en date du 12 avril 1864.

Le jugement de la cour est motivé comme suit:

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INCLUSIVEMENT.

Orant que le demandeur a prouvé par une preuve légale et suffisante les essentiels de sa déclaration, excepté en autant qu'il prétend que l'auté entre feu Ménécier et son épouse en vertu du contrat de mariage du 18 juillet 1822 n'a jamais été dissoute et que la dite communauté encore;

Et particulièrement qu'il appert par le contrat de mariage entre feu Ménécier et son épouse, en date du 18 juillet 1822, qu'il fut stipulé qu'il y aurait une communauté entre les conjoints;

Qu'il y avait stipulation de propre des biens de la future à être constatés par un inventaire sous quinze jours du dit 18 juillet 1822, qu'il était en outre convenu par le dit contrat de mariage qu'il y aurait un douaire préfix de 3000 frs., ancien cours, en faveur de la future, et reprise en cas de dissolution de communauté, et que de plus les parties à cet acte se sont fait don mutuel en faveur du survivant;

Considérant que, par sentence de la ci-devant Cour du Banc du Roi, pour le district de Montréal, en date du 8 juin 1826, une séparation de biens d'entre feu Ménécier et son épouse a été prononcée;

Vu que le 15 juin 1826, la dite dame Ménécier a produit devant le même tribunal sa renonciation à la communauté qui avait auparavant existé d'entr'elle et son mari, et que, par jugement de la même cour en date du 8 octobre 1826, acte lui a été accordé de la production de sa dite renonciation et de la nomination d'un praticien pour établir ses reprises et droits matrimoniaux, et vu que le 19 de février 1827 le même tribunal, le rapport du praticien nommé pour constater les reprises et droits matrimoniaux de la dame Ménécier a été homologué et le dit feu Ménécier condamné à payer à la dite Ménécier, son épouse, la somme de 24,739 frs. 19, ancien cours, pour ses droits et reprises matrimoniaux tels que constatés et établis par le dit rapport;

Considérant que, par les sentences interlocutoires et définitives, la communauté qui avait jusqu'alors existé entre feu Ménécier et son épouse a été dissoute, et que le jugement prononçant la séparation de biens a été subseqüemment exécuté et a eu son effet légal;

Considérant que dans l'espèce actuelle la prescription ne courait pas contre fene Marie Françoise Gauthier pour ses droits et reprises matrimoniaux pendant l'existence de son mariage avec feu Ménécier son mari et pendant qu'elle était sous puissance de mari, et vu que de fait il n'y a jamais eu de prescription acquise contre la dite dame Ménécier pour ses dits droits et reprises matrimoniaux, tels que constatés par le dit jugement du 19 février 1827, et qu'il appert par les défenses mêmes de la défenderesse que les reprises n'ont jamais été payées, et considérant de plus que les droits et reprises n'ont jamais été compensées ou éteintes.

Considérant que, quoique, par son testament solennel en date du 4 novembre, 1856, le dit feu Ménécier a constitué sa dite épouse sa légataire universelle en usufruit de tous ses biens aux charges et conditions *inter alia* de payer et acquitter ses dettes, néanmoins dans l'espèce actuelle il n'y a pas eu confusion en la personne de la dite dame Ménécier quant aux dettes dues par son dit époux à la dite dame Ménécier, son épouse.

Considérant que la dite dame Ménécier par, son testament solennel en date

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du 29 décembre 1858, a constitué le dit demandeur son légataire 1858
en usufruit de tous ses biens, et vu que le demandeur, comme tel et No
universel en usufruit a le droit de réclamer les dettes dues par le dit ataire
clier au temps de sa mort à son époux et le douaire établi par le
mariage susdit :

Et considérant que la défenderesse n'a pas établi par aucune pr personne de
suffisante les allégués essentiels de ses défenses, excepté qu'en aut
prouvé que la communauté entre feu Ménéclier et son épouse a été mssuite
au temps et de la manière par elle alléguée; déboute les dites défenses et
condamne la défenderesse à payer au demandeur la somme de quarante-un mille
deux cent deux livres, un sol et quinze deniers, ancien cours, égale à la somme
de six mille huit cent soixante-sept piastres, un centin, courant savoir :

1°. La somme de vingt-quatre mille sept trente-neuf livres, un sol et neuf de-
niers, ancien cours, égale à la somme de quatre mille cent vingt-trois piastres et
dix-huit centins, courant, montant des reprises matrimoniales telles que constatées
par le jugement du dix-neuf février mil huit cent vingt-sept, ci-haut mentionné;

2°. La somme de treize mille quatre cent soixante-et-trois livres et six deniers,
ancien cours, égale à la somme de deux mille deux cent quarante-trois piastres
et quatre-vingt-trois centins, courant, pour le montant dont elle, la dite Dame
Marie Françoise Gauthier a hérité de feu Louis Gauthier, son père, tel que con-
staté par l'acte de partage en date du quatorze février mil huit cent vingt-quatre
de la succession du dit feu Louis Gauthier, et enfin la somme de trois mille livres,
ancien cours, égale à la somme de cinq cent piastres, courant, pour le montant
du douaire préfix de la dite Dame Marie Françoise Gauthier, établi en sa faveur
par son dit contrat de mariage en date du dix-huit juillet mil huit cent vingt-
deux, avec intérêt sur la dite somme de six mille huit cent soixante-sept piastres
et un centin, à compter du vingt-sixième jour de juillet mil huit cent soixante-et
un, date de la mort de la dite Dame Marie Françoise Gauthier, jusqu'à l'actuel
paiement et aux dépens.

L. Bétournay, avocat du demandeur.

LaFrenaye & Armstrong, avocats de la défenderesse.
(P. R. L.)

MONTREAL, 29th SEPTEMBER, 1863

Coram SMITH, J.

No. 1884.

Leroux et al vs. Crevier et vtr et al.

DONATION. INSINUATION.

Held:—1°. That the heirs of a donor can invoke the nullity arising out of the want of insinuation of the deed of donation.

2°. That where property has been donated with charges upon it which are equivalent to the value of the property, the deed of donation need not be registered.

Semle that the donor himself cannot invoke such nullity as the want of insinuation.

The facts of this case fully appear from the statements of the judge rendering the judgment.

SMITH, J.—This was a case which brought up a question on the law of dona-
tions. In the year 1839, by deed before Racicot, Notary, two brothers, named

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INCLUSIVEMENT.

ly, Isidore and François Leroux purchased a certain property, situate in the St. Joseph Suburb, Montreal, from one François Basinet. The land measured fifty feet in front, by sixty in depth, and was purchased for 1,752 francs. Isidore Leroux married a woman named Crevier.

On the 20th September, 1832, Isidore Leroux bequeathed the property, including the lot above mentioned, constituting her his universal heir, to Marguerite Crevier, the full and entire possession and proprietorship of the property.

In March, 1852, Isidore Leroux died, without having revoked his will. The defendant, Crevier, then took possession of the property bequeathed to her. On the 20th November, 1853, François Leroux also died at Montreal intestate, so that, as Plaintiffs alleged, his property passed to his brothers and sisters, and their representatives, as his heirs, that is to say, to the present Plaintiffs and the children of Isidore Leroux, the co-proprietor of the property in question. After the death of François Leroux, whose estate the plaintiffs now claimed, the defendant had continued to enjoy the whole of the property in question. The plaintiffs, by the conclusions of their declaration, claimed that the property should be divided, and that they should be put in possession of that part which they inherited, as representatives of the donor, that is, eight ninths of the undivided half. The defendants in their plea admitted the preliminary facts, but denied that François Leroux, at the time of his death, was proprietor of any part of the immovable property in question. For some time before his death he had ceased to be proprietor, having by deed, dated 18th May, 1852, given the property to the said Marguerite Crevier, widow of Isidore Leroux, one of the present defendants. This donation, as the defendants alleged, was made with certain charges upon the property, for the maintenance of François Leroux, &c. It appeared that the donation had never been insinuated, and the plaintiffs claimed that in consequence of this defect, it was null and void, and should be set aside. The question then was with respect to the insinuation of donations. Could the defect be invoked by the donor or his heirs? His Honor had all along been of opinion that the absence of insinuation could never be invoked by the donor. But several authorities seemed to establish that the want of insinuation could be taken advantage of by the donor as well as the donee. He was not satisfied that that these authorities settled the question, or that the weight of authority might not incline the other way; but, assuming for the moment that these authorities were conclusive, his honor thought the heirs of the donor could take advantage of the defect. There had been no insinuation, and the heirs of the donor claimed to have the donation revoked. But where property had been donated on certain conditions, with charges upon it, which were an equivalent for the gift, then it was not necessary that the donation should be insinuated. Richard on Donations *entre vifs*, stated that when a donation is made with charges for the profit of the donor, as an equivalent for the price of the property, insinuation is not required. The question in the present case then was, were the charges upon this donation an equivalent for the value of the property? His Honor believed that the evidence on this point adduced on the part of the defendants was stronger than that adduced on the part of the plaintiffs. The evidence for the defendants showed clearly that when this donation was made, the property

Leroux et al. vs. *Crevier*. was worth only \$500. The house was small, and the donee laid out 1858 of money in improving the property. The facts all went to show that the house was now worth £500 it was owing to the care of the defendant *Crevier*. The plaintiffs had endeavoured to show that after the death of *Isidore* brother's health failed rapidly, and that he took it so much to heart, *Isidore* making the donation he retired to a hospital, and soon after died. *Isidore* might be the case, but the evidence entirely failed to establish the same. It merely showed that the man was sick, and that he died in a hospital. Almost everybody is aware of cases in which the party was apparently on his death-bed when the donation was made, and afterwards recovered his health, and perhaps survived for twenty years. Although, therefore, the want of insinuation was a fatal defect, yet under the circumstances of the present case, the charges must be held equal to the donation, and the action be dismissed with costs.

The judgment was *motivé* as follows:

"The Court, * * *. considering that the said plaintiffs have failed to establish in law any right whatsoever to have and maintain the conclusions of their said action:—

And further considering that the said defendants have established by legal evidence that the lot of land given by the said *Ferdinand Leroux dit Rousson* to the said defendant *Marguerite Crevier* by *acte de donation* bearing date the 18th day of May, 1852, passed before *M. Houlé* and *Collègue* Notaries, was not at the time of the passing and execution of the said deed of greater value than the charges imposed on the said lot and the said donation; and that by reason thereof, and by law, the insinuation of the said donation was rendered unnecessary. The Court doth maintain the exception pleaded by the defendants, and doth dismiss the plaintiff's action with costs distraits in favor of Messrs. *Leblanc & Cassidy* the attorneys of the said defendants upon their motion to that effect."

Doutre & Daoust, for plaintiffs.

Leblanc & Cassidy for defendants.

F. W. T.

Action dismissed.

CIRCUIT COURT.

MONTREAL, 31st OCTOBER, 1863.

Coram SMITH, J.

No. 4297.

McGarvey vs. Auger.

NOVATION.

Held.—That the taking of a note made by B. for goods sold and delivered to A. does not operate a novation so as to discharge A. for the price of the goods without an express agreement to make a novation.

The facts of this case appear from the judgment delivered by the judge;
SMITH, J.—The plaintiff in this case was a cabinet maker, doing a large business in Montreal. Two gentlemen entered his store at the same time, and one

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* Vide

McGarvey
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JURY 1863, INCLUSIVEMENT.

The defendant, purchased about \$80 worth of furniture, and tendered payment. To make the note more easy of negotiation as the other, stated that he also wanted furniture; it was agreed that he should purchase worth, and give his note for the whole. This he did, and gave a receipt, declaring that it would be discounted at the People's Bank. During banking hours, it was agreed that delivery of the goods should be made until the following day. In the evening, however, Mr. Auger, the plaintiff, came to Mr. McGarvey, and strongly represented his desire to obtain the furniture that evening. Delivery was then given, and in the morning it was found that Mr. Badeaux's note was absolutely worthless. Mr. McGarvey thereupon sued Auger for the value of the goods. Defendant pleads the goods were his, and Badeaux was the debtor of the plaintiff who took the note of Badeaux and thereby made a novation of his claim.

Plaintiff replied that the note was not intended to institute a novation, and was simply taken as collateral security, and this seemed borne out by the evidence of his clerk. His honour referred to the case of *Jones and Lemecurier* in appeal 2 *Revue de Leg.*, in which a note was taken in payment of rent, novation pleaded, and the plea dismissed, and added that novation must be expressed, and was not to be presumed.

Judgment was for plaintiff for amount of goods actually delivered to defendant less the amount collected by him from the securities.

M. Doherty, for plaintiff.

Judgment for plaintiff.

Doutre & Daoust, for defendant.

(W. E. B.)

MONTREAL, 13 NOVEMBRE, 1863.

Coram BERTHELOT, J.

No. 2477.

Lacoste vs. Chauvin.

JUGE: Qu'un billet notarié reçu en brevet n'est pas prescriptible par le laps de cinq ans.

Cette action fut instituée le 15 mai 1863, pour une somme de \$45.36, basée sur un billet reçu en brevet devant Notaires, le 27 fév. 1856, et payable à la touchant 1857.

A cette demande, le défendeur plaida d'abord par une exception de prescription, savoir: la prescription de cinq ans, établie par la section 31 du chapitre 54 des Statuts Refondus B. C. et par une seconde exception le défendeur plaident paiement.

La cour rejeta la première exception plaidée par le défendeur, faisant la remarque que, dans son opinion, cette clause du statut ne devait s'appliquer qu'aux simples billets promissoires ordinaires, et non aux billets passés en brevet devant deux notaires. Malgré différentes décisions dans le sens invoqué par le défendeur,* la cour rejeta le plaidoyer de prescription du défendeur, et ce dernier n'ayant pas pu soutenir par preuve son plaidoyer de paiement l'action du demandeur fut maintenue avec frais.

Jugement pour le demandeur.

Jodoin & Lacoste, pour le demandeur.

Denis & Trudel, pour le défendeur.

(1. A. J.)

* Vide 6, L. C. Jurist, p. 257.

MONTREAL, 31 OCTOBER, 1863.

Coram BERTHELOT, J.

No. 1022.

Copcutt et al. vs. McMaster.

Held: That a draft drawn in New York and accepted in Montreal payable generally for which was certain goods purchased in New York is payable in current C.

The action was brought to recover \$134.11, amount of draft plaintiffs resident in New York, and accepted by the defendant resident in Montreal, payable generally to the order of the said plaintiffs.

The plea to the action was that the consideration for which the draft was drawn was certain goods purchased by the said defendant from the plaintiffs at New York.

That the prices charged in the invoice for said goods were United States currency.

That on the maturity of the said draft the defendant duly offered to pay the amount thereof in United States currency or in Canadian currency less thirty-five per cent. discount, the rate of exchange existing between Montreal and New York when said draft matured.

The defendant tendered into Court with his plea the sum of \$87.10, in Canadian currency, the equivalent of the amount of draft sued for in United States currency at the current rate of exchange at the date of the maturity of said draft, and the further sum of \$18.82, to cover any charges for interest and costs for which the said defendant might be liable.

Per Curiam. It was proved by a *Commissio Rogatoire* that the prices charged were United States currency.*

The judgment was motivé as follows:

Considérant que le défendeur est mal fondé et que la traite en date du 16 sept 1862 à New York sur le défendeur un résident à Montréal était payable en ce dernier lieu où le défendeur avait alors et a encore son domicile; en l'absence d'aucune réserve au contraire quant au lieu du paiement et au cours de la monnaie vu que les demandeurs ont touché la somme de 106 dollars déposée par le défendeur et qu'il ne reste dû sur la dite traite que la somme de \$28.11, a condamné et condamne le dit défendeur à payer aux demandeurs la dite somme de \$28.11 du cours actuel de la province du Canada, balance restant due sur la susdite traite tirée par les dits demandeurs sur le dit défendeur et acceptée par ce dernier avec intérêt sur la dite somme de \$134.11, du 19 mars 1863 jour de l'échéance de la dite traite jusqu'au 28 de mai 1863 et enfin sur la dite somme de \$28.11, à compter du 19 de mars 1863 jusqu'au paiement, et aux dépens de l'action et de la contestation.

Judgment for Plaintiff.

John Dunlop, *for plaintiff.*

Strachan Bethune, *for defendant.*
(J. D.)

* Authors referred to by the Court: Pardessus, vol. 2, p. 118, sec. 3, and p. 334. Story on Bills of Exchange, p. 59, sec. 44. Pothier contr. de change No. 35, 47, 48 and 49.

LISTE

DES JUGEMENTS RENDUS EN COUR D'APPEL, A COMPTER DE MARS 1863, JUSQU'AU 19 DECEMBRE 1863, INCLUSIVEMENT.

TERME DE MARS 1863.

MONTREAL.

APPELLANT.	DEFENSE.	DATE.	JUGE.	JUGEMENT.
37 Dunlop.....	McDonald.....	2 Mars,	Juges Aylwin, Duval, Meredith, Mondet, Berthelot.....	Motion pour faire renvoyer l'appel rejeté avec frais contre l'appelant.
Erpartin Kemp.....		"	"	" Requête pour être admis huissier—accordée
Bottanley.....	Lumley.....	"	"	" Appel d'un jugement interlocutoire—accordé.
Barré.....	Ross.....	"	"	" Id.
29 Dorian.....	Montmarquet.....	"	"	" Appel discontinué.
12 40 Knowlton.....	Clarke.....	"	"	" Motion pour procéder ex parte rejetée avec dépens.
"	"	3	"	" Motion pour rejeter exception—accordée avec dépens.
100 Scaud.....	Campbell.....	"	"	" Ré argument ordonné sur la motion pour faire déclarer irréguliers, insuffisants nuls, la requête en appel, service d'écrit et tous les procédés pris par l'appelant—motion renvoyée avec dépens.
81 Pétion.....	Prestor.....	"	"	" Motion pour faire renvoyer l'appel pour manque d'avis et insuffisance de cautionnement rejetée avec dépens.
33 Baudet.....	Prestor.....	"	"	" Id.

APPELANTS.	INTIMES.	DATE.	JUGES.	JUGEMENTS.
20 de Baugé.....	Philip.....	5 MARS	Badgley, Juge Mondelet diss.	Confirmé et réformé en partie avec dépens en Cour Inférieure, chaque partie payant ses frais en appel.
31 Doctory.....	Mullin.....	"	Juges Duval, Meredith, Mondelet, Badgley, Berthelot.....	Juge Aylwin diss. Confirmé.
51 Harbor Commissioners.....	Lyman et al.....	"	"	"
24.....	Hall et al.....	"	"	"
Hamilton.....	Melaren.....	"	Aylwin, Duval, Meredith, Mondelet, Berthelot.....	Appel d'un jugement interlocutoire—accordé.
75 Président &c.....	Loosan.....	"	"	Règle sur motion du 9 dec. 1861, demandant à faire débouter l'appel et mettre au néant tous les procédés en icelui vu la non-autorisation des appelants à porter le présent appel.—rejetée avec dépens.
Farris.....	Orehaus.....	6	"	Motion pour appel d'un jugement interlocutoire, renvoyée faute de production d'exhibits.
Davis.....	Cushing.....	"	"	Appel d'un jugement interlocutoire—accordé.
23 Patee.....	Proctor.....	7	"	Motion pour faire renvoyer comparution de l'intimé faute de service, soit personnel ou au domicile élu de l'avocat de l'appelant et défaut de comparution rejetée avec dépens.
38 Baudet.....	Proctor.....	"	"	Ibid.

APPELANTS.	INTIMES.	DATE.	JUGES.	JUGEMENTS.
43 Evans &c.....	Prévost et al.....	7 MARS	J. Aylwin, Duval, Meredith, Mondelet, Berthelot Motion.	

APPELANTS.	DATE.	JURÉS.	JUGEMENT.
de Bruneau.....	7 mars	J. Aylwin, Duval, Meredith, Mondelet, Berthelot.	Motion pour faire rejeter la requête en appel de l'appelant et renvoyer l'appel—accordée avec dépens.
23 Boivier.....	9 "	" "	" Motion pour faire déclarer l'appel désisté et abandonné—accordée.
32 Pelouquin.....	" "	" "	" Motion du défendeur en désaveu pour demander caution <i>judicatum solvi</i> —accordée.
79 Desloges.....	" "	" "	" Appel au Conseil Privé—accordé.

QUEBEC

18 Orlé.....	12 mars Juges Aylwin, Duval, Meredith, Mondelet, Berthelot.	Confirmé.
21 Gagné.....	" " " " " [Juge Mondelet diss.	"
13 Fraser.....	" " " " " "	"
5 Leonard.....	" " " " " "	"
23 Patton.....	" " " " " "	"
11 Québec Bank.....	" " " " " "	"
33 Warrick.....	" " " " " [Juge Duval diss.	"
98 Brown.....	" " " " " Juge Duval, Meredith diss.	Infirmé.
18 Lloyd.....	" " " " " " Juge Aylwin diss.	Confirmé.
80 Benson.....	" " " " " " Juge Duval, Meredith, diss.	Infirmé.
27 Vallière.....	" " " " " "	"
15 Tourangeau.....	" " " " " "	"

TERME DE JUIN 1863.

MONTREAL.

13 McVeigh.....	1 juin, Juges Aylwin, Meredith, Mondelet, Berthelot.	Infirmé.
88 Gilmour.....	" " " " " "	" Confirmé.
70 Kinney.....	" " " " " Juge Aylwin diss.	"
19 Panet.....	" " " " " Juge Berthelot, Mondelet, Berthelot, diss.	Confirmé.

JUGEMENTS RENDUS EN COUR D'APPEL.

APPELANTS.	INTIMES.	DATE.	Juges.	Jugement.
37 Bourassa.....	Bedard.....	"	Juge Aylwin, Meredith, Mondelet, Berthelot.	Infirmé.
11 Ros.....	Abbott.....	2	"	"
82 Pilon.....	Proctor.....	"	"	Pelette. " Re-argument—ordonné. Berthelot " Motion pour le renvoi de l'appel pour l'absence du cauditor, et la régularité dans le rapport du dossier—accordée.
93 Beaulieu.....	Proctor.....	"	"	"
Trust & Loan Co.....	Julien.....	3	"	"
Crebama.....	Paradis.....	"	"	"
Lane.....	Campbell.....	"	"	"
Hofnung.....	Porter.....	"	"	"
31 Bonville.....	Reeves.....	5	"	"
59 Tarry.....	Trust & Loan Co.....	"	"	"
34 Viger.....	Beliveau.....	"	"	"
100 Lyman.....	Bouthillier.....	6	"	"
99 Doutrin.....	Elvige.....	"	"	"
Banque du Peuple.....	Le Maire & Co, Sorel.....	8	"	"
80 Boston.....	Lelièvre.....	"	"	"
Roy.....	Bauguy & Rogé.....	9	"	"
31 Levy.....	Rhodes.....	15	Juges Aylwin, Duval, Meredith, Mondelet, Berthelot.	Confirmé.
Patten.....	Donsely.....	"	"	"
Alford.....	Mayor et al.....	"	"	"
3 Leslie.....	Mayor et al.....	"	"	"
3 Brown.....	Gaggy.....	"	"	"
3 Carter.....	Martin.....	"	"	"
3 Roy.....	Roy.....	"	"	"

QUEBEC.

APPELANTS.	INTIMES.	DATE.	Juges.	Jugement.
44 Anderson.....	Généreux.....	15	J. Aylwin, Duval, Meredith, Mondelet, Berthelot.	Infirmé.
37 McCulloch.....	Hatfield.....	"	"	"

APPELANTS.	INTIMES.	DATE.	JUGES.	JUGEMENTS.
44 Anderson.....	Généreux.....	15 juin J. Aylwin, Duval, " "	" "	Motion pour faire renvoyer le dossier—accordée.
37 McOulloch.....	Hatfield.....	" " " "	" " " "	Motion de l'appelant pour fournir nouvelles cautions—accordée avec dépens en faveur de l'intimé tant sur cette motion que sur celle de l'intimé pour faire renvoyer l'appel. Cautionnement à être fourni dans les dix jours. Motion pour substitution—accordée.
TERME DE SEPTEMBRE 1863.				
MONTREAL.				
32 Pelquin.....	Société de Construction.....	1 Sept., Juge en Chef, Duval, Meredith, Mondelet.....	" "	Désistement d'appel—accordé.
Banque du Peuple.....	Le Maire & Co, Sorel.....	" " " "	" " " "	Acte de déclaration de désistement—accordé de consentement.
Bertrand.....	Clément.....	" " " "	" " " "	Désistement de motion—accordé.
Bertrand.....	Clément.....	" " " "	" " " "	Ibid.
32 Bouvier.....	Reeves.....	2 " Juges Aylwin, Meredith, Mondelet, Berthelot.....	" " " "	Motion de l'intimé pour faire renvoyer l'appel vu le non-paiement des dépens—accordée s'ils ne sont payés le ou avant le 9 courant.
21 Lamère.....	Crebasse & Guévrement.....	" " " "	" " " "	Requête en intervention—accordée.
30 Gibbs.....	St. Lawrence Elev.....	" " " "	" " " "	Re-argument ordonné.
30 St. Lawrence Elev.....	Gibbs.....	" " " "	" " " "	Ibid.
30 Henderson.....	Bradford.....	" " " "	" " " "	Ibid.
30 Dostre de quai.....	Elvidge.....	" " " "	" " " "	Motion pour faire renvoyer le dossier—accordée.
71 Bariss.....	McCorkill.....	" " " "	" " " "	Motion de l'appelant pour fournir nouvelles cautions—accordée avec dépens en faveur de l'intimé tant sur cette motion que sur celle de l'intimé pour faire renvoyer l'appel. Cautionnement à être fourni dans les dix jours. Motion pour substitution—accordée.
5 Lanigan.....	Gibson.....	" " " "	" " " "	"

JUGEMENTS RENDUS EN COUR D'APPEL.

APPELANTS.	INTIMES.	DATE.	Juge en Chef, Duval, Meredith, Mondelet,.....	JUGES.	JUGEMENT.
60 McDonald.....	Lamb & Nickle.....	2 sept.	"	"	Requête en reprise d'instance—accordée.
86 Sewell.....	Vancouver.....	"	"	"	Motion pour casser bref d'appel—rejeté avec dépens.
89 Boston.....	Lelièvre.....	"	"	"	Motion du Procureur Général pour comparaitre—accordée.
Lacroix.....	Bissonnette.....	"	"	"	Motion pour permis d'appeler d'un jugement interlocutoire—rejetée par consentement.
30 Bank of Montreal.....	McDonell.....	"	"	"	Suggestion de mariage—acte accordé de consentement.
".....	".....	"	"	"	Requête en reprise d'instance—accordée.
15 Corporation St. Philippe-Lussier.....	".....	3	"	"	Motion pour faire renvoyer l'appel—accordée avec dépens.
27 Courtoyer.....	Fourquin.....	4	"	"	Ibid.
Orebania.....	Parilly.....	"	"	"	Motion pour faire déclarer appel déserté—accordée avec dépens.
Lionais.....	Lemoine.....	"	"	"	Motion pour un jugement interlocutoire rejetée avec dépens.
Lemoine.....	Lionais.....	"	"	"	Ibid.
".....	".....	"	"	"	Ibid.
69 Carpentier.....	Gauville St. Germain.....	"	"	"	Motion pour renvoi de l'appel—accordée.
Hofnung.....	Porter.....	4 Sept.	Juge en Chef, Duval, Meredith, Mondelet,.....		Motion pour faire déclarer appel déserté et abandonné—accordée avec dépens, et ordre du 3 juin permettant d'appeler rescindé avec dépens en faveur des intimés.

APPELANTS.	INTIMES.	DATE.	Juge en Chef, Duval, Meredith, Mondelet,.....	JUGES.	JUGEMENT.
35 Burns.....	Ross.....	4 Sep.,	Juge en Chef, Duval, Meredith, Mondelet,.....		Motion pour renvoi de l'appel, vu le défaut de procédure.

appel déserté et abandonné-accordée avec dépens, et ordre du 3 juin permettant d'appeler rescindé avec dépens en faveur des intimés.

APPELANTS.	INTIMÉS.	DATE.	JUGE.	JUGEMENT.
35 BURNS.....Ross.....		4 Sep.,	Juge en Chef, Duval, Meredith, Mondelet,	Motion pour renvoi de l'appel, vu le défaut de production des factums de l'appelant—accordée qu'il faut aux frais seulement.
36 Davies.....Cushing.....		" "	" "	Ibid.
37 Bourneau et al.....Bodard et al.....		" "	" "	Motion des appelants pour faire déclarer les intimés déchus du droit d'appel à Sa Majesté et concluant au renvoi du dossier à la Cour Inférieure—accordée.
38 Hough.....Ross.....	5	" "	" "	Motion pour bref de certiorari—accordée.
39 Weybert.....Pennell.....	7	" "	" "	" Monk, Juge Duval. Infirmé.
40 Lemoine.....Lionais.....	"	" "	" "	[diss.]
41 Leduc.....Shaw.....	"	" "	" "	" Berthelot. Confirmé.
42 Robertson.....Smith.....	"	" "	" "	" [Juge Meredith, diss. Infirmé.
31 White.....Dorwin.....	"	" "	" "	" Re-argument ordonné.
37 Dunlop.....McDonald.....	"	" "	" "	" Ibid.
21 Lamère.....Crépeau & Guèvremont.....	9	" "	" "	Motion de l'intimé pour renvoi de l'appel, vu le défaut de production du factum de l'appelant—accordée quant aux frais seulement.
43 Lemoine.....Lionais.....	"	" "	" "	Motion de l'intervenant Guèvremont pour faire déclarer appel déserté vu le défaut de transmission du dossier—accordée avec dépens.
"....."	"	" "	" "	Motion de l'appelant pour appel au Conseil Privé—rejetée avec dépens.
"....."	"	" "	" "	Ibid.

QUEBEC.

APPELANTS.	INTIMES.	DATE.	JUGES.	JUGEMENTS.
45 Desjardins.....	Tart et al.....	12 Sept.	Juges Duval, Meredith, Mondelet, Berthelot.	Re-audition ordonnée.
51 Harper.....	Blodau.....	" "	" "	" Ibid.
59 Barnatchar.....	Comillard.....	15 "	" "	" Confirmé.
48 Raymond.....	Martin.....	" "	" "	" "
49 Page.....	Vezina.....	" "	" "	" Infirmé,
52 Dinning.....	Oliver.....	" "	" "	" "

TERME EXTRAORDINAIRE DE NOVEMBRE 1863.

MONTREAL.

69 David.....	McDonald.....	12 Nov.	Juge en Chef, Duval, Meredith, J. Mondelet, diss.	Confirmé.
12 McDonald.....	David.....	" "	" "	" "
66 Hopkins.....	David.....	12 Nov.	Juge en Chef, Duval, Meredith, J. Mondelet, diss.	Confirmé.
Fleet.....	Starnes & Brown.....	" "	" "	Mondelet, Badgley Motiva pour appel d'un jugement interlocutoire—
95 Henderson.....	Exton.....	" "	" "	J. Mondelet, diss. Cor.
36 Torrance.....	Alan.....	" "	" "	" "
43 Rodgers.....	Scharf.....	" "	" "	" "
42 ".....	".....	" "	" "	" "
44 ".....	".....	" "	" "	" "
46 ".....	Laurin.....	" "	" "	" "
79 Stoddart.....	Leblond.....	" "	" "	" "
1 Henry.....	Maloney.....	" "	" "	" "
43 Brown.....	Wood.....	" "	" "	" "
62 Robt.....	Smith.....	" "	" "	" "
58 Day et al.....	Dorion.....	" "	" "	" "
31 White.....	Dorwin.....	" "	" "	" "
6 Wardle.....	Rethune.....	" "	" "	" "
80 Henderson.....	Bradford.....	13 "	" "	" "
47 McDonald.....	Lambe.....	" "	" "	" "
80 Auld.....	Laurent.....	" "	" "	" "

APPELANTS.

APPELANTS.	INTIMES.	DATE.	JUGES.	JUGEMENTS.
123 Aylin.....	Judah.....	14 Nov.	Juge en Chef, Duval, Meredith, Badgley,.....	Motion pour faire intervenir le Juge Rolland—rejetée

cause du rôle d'inscrip-
tion—accordée.
Requête pour reprendre l'in-
stance—accordée de con-
sentement.
Nouvelle audition ordonnée.

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JUGEMENTS RENDUS EN COUR D'APPEL.

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APPRIANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENTS.
123 Aylwin	Judah	14 Nov.,	Juge en Chef, Duval, Meredith, Badgley,	Motion pour faire intervenir le Juge Rolland—rejetée sans frais de consentement.
79 Stoddart	Lefebvre	" "	" "	Appel à Sa Majesté—accordé de consentement.
94 Smith	Patton	" "	" "	Motion de l'intimée pour une pension provisoire—renvoyée avec dépens.
93 Bourgois	Jeannot Lachapelle et al.	16 "	" "	Discontinuation d'appel accordée de consentement.
Cullen	Hagan	" "	" "	Motion pour substitution—accordée.
95 Henderson	Buxton	18 "	" "	Motion pour distraction de frais—accordée.
41 Perrault et sir	Ontario Bank	19 "	" "	Infirmé.
43 Turner	Drummond	" "	" "	J. Mondelet, diss.
98 Lagrange	Carlisle	" "	" "	Juge en Chef, diss.
31 White	Dorwin	" "	" "	" "
70 Rolland	Jodion	" "	" "	Motion pour appel au Conseil Privé—accordée.
19 Starke	Henderson	" "	" "	Motion pour renvoi de l'appel—accordée.
26 Racine	L'Equitable de Londres	2 "	" "	Motion pour permettre de fier un certain "Stock Book" marqué "B," filé à l'enquête—accordée.
Bank of Toronto	Mathews	3 "	" "	Motion pour renvoi de l'appel—accordée, appel débouté.
Cullen	Hagan	" "	" "	Motion pour appel d'un jugement interlocutoire—accordée.
91 Cuvillier	Bank B. N. America	7 "	" "	Motion pour bref de certiorari—accordée.
			Monk	Infirmé.

TERME DE DÉCEMBRE 1863. MONTREAL.

1 Déc., Juge en Chef, Duval, Meredith, Mondelet, Badgley Motion pour permettre de fier un certain "Stock Book" marqué "B," filé à l'enquête—accordée.
Motion pour renvoi de l'appel—accordée, appel débouté.
Motion pour appel d'un jugement interlocutoire—accordée.
Motion pour bref de certiorari—accordée.
Monk.....Infirmé.

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OF THE

LOWER CANADA JURIST.

COMPILED BY
STRACHAN BETHUNE, *Advocate.*

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" " :— <i>Vide</i> WILL.	
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" :— <i>Vide</i> PARTNERSHIP.	
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from the plaintiff a large quantity of wheat, payable cash on delivery, and had received delivery of the wheat, but had only paid a portion of the price, and that the defendant, upwards of two months afterwards, was about to go abroad to Scotland, his original domicile, where his family had resided for five years, without paying the plaintiff the balance, and without leaving any property in Canada out of which the plaintiff could get paid, and after repeated applications had been made to him for payment. (Ross et al. vs. Burns, S. C.).....	35
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